United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

F 783

FOR BINDING

BRIEF FOR APPELLANT
AND
JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,455

MARY R. WHEATLEY,

Appellant,

v.

HERMAN ADLER
and
ASSOCIATED TRANSPORT, INC.,

Appellee.

Appeal from the United States District Court
for the District of Columbia

KARL G. FEISSNER

Alpern & Feissner
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Washington, D. C. 20005

Attorney for Appellant

STATEMENT OF QUESTIONS PRESENTED

In an action whereby Appellant's claim for compensation under provisions of the Longshoremens' and Harbor Workers' Compensation Act, was rejected by the Deputy Commissioner on the grounds that the death of Appellant's decedent did not arise out of and in the course of the employment, may such finding be sustained where the employer has offered no substantial evidence to contradict Plaintiff's evidence that her claim came within the provisions of the Act; that is, where the employer did not go forward with evidence to meet the presumption that injury or illness occurred during the employment, may the above findings be sustained.

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TABLE OF CASES

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and
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Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based upon the Act of October 31, 1951, 65 Stat. 726, as amended, 28 U.S. Code, 1291, and the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S. Code 901-50, made applicable to the District of Columbia by D. C. Code, Title 36, Sec. 501.

STATEMENT OF THE CASE

This cause arises out of Plaintiff's Complaint to set aside the compensation order filed by the Defendant Deputy Commissioner on February 2, 1966, pursuant to the provisions of the Longshoremens' and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, U.S.C.A., Sec. 901 *et seq.*, as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D. C. Code, Sec. 36-501 (1961 Ed.).

On February 12, 1964, the decedent, Edward E. Wheatley, was in the employ of Defendant, Associated Transport, Inc., in the District of Columbia. The decedent had been employed by the defendant for 17 years as a truck mechanic. At or about 8:48 A.M. on the above date, the decedent reported to work and proceeded to go about his normal and usual work assignments. On this particular day, the decedent was ordered by his supervisor, Robert C. Riegel, shop foreman, to remove a tractor wheel and rethread the axle. After commencing the job, the decedent left the shop for a private purpose and upon his returning, the decedent collapsed and died at or about 10:22 A.M. as set forth in the autopsy report, Commissioner's Exhibit No. 2.

The claim for compensation was filed on behalf of decedent's wife, Mary R. Wheatley, Plaintiff herein, as set forth in Commissioner's Exhibit No. 1. The immediate cause of decedent's death was found to be myocardial insufficiency due to acute heart disease. (Death Certificate, Commissioner's Exhibit No. 3).

A hearing was held on August 31, 1965. On February 2, 1966, five months after, the Defendant Deputy Commissioner rendered his decision rejecting Plaintiff's compensation claim, and for reasons stated, "That the collapse and the death of the employee on February 12, 1964, did not arise out of and in the course of the employment." It is from this finding that Plaintiff is appealing to this Court.

The medical evidence and testimony support Plaintiff's contention that the death arose out of and in the course of decedent's employment. Dr. James Chapman, a specialist in internal medicine and cardiology (J.A. 76, 77) testifying on behalf of the Plaintiff, found after a microscopic study of the decedent's heart tissue no changes from normal (J.A. 86) which means that decedent's attack had occurred within one hour before death. (J.A. 88). The decedent's activities on the morning of February 12th, were normal (J.A. 87). His activities for three or four days prior to death were usual and normal (J.A. 92). The time of death was at or about 10:22 A.M. (J.A. 103) and decedent reported to work at or before 8:48 A.M. as his time card was punched at this hour (J.A. 100). All the medical testimony points to the fact that a precipitating cause of decedent's demise must have occurred while decedent was employed and working in the usual course of his employment. (J.A. 97, 101, 102, 104, 106, 107). This position is uncontroverted by Defendant, Associated Transport's medical testimony as stated by Dr. Lawrence J. Thomas (J.A. 111, 114, 115, 116, 117).

STATEMENT OF POINTS

1. Where the employer offered no evidence to the contrary, the statutory presumption that Appellant's decedent's death arose out of and in the course of the employment should have been sustained as a matter of law.

2. In fact, the Appellant proved, uncontroverted, that Appellant's decedent's death was caused by and related to a strain which had to occur in the employment.

SUMMARY OF ARGUMENT

In matters such as this, there is a statutory presumption that a workman's death which occurs on the job and during the course of his employment, arose out of and was caused by the employment. The Act places the burden upon the employer to meet this presumption with substantial proof. For the particular case at Bar, the cardiologist on behalf of Appellant's decedent testified that the death was related to a strain in the employment. The expert on behalf of the employer testified that he didn't know what could have caused it; that, in fact, the death could have been caused by the act of the employee in urinating on a very cold day.

ARGUMENT

In *Hancock v. Einbinder,* 114 U.S. App. D.C. 67, 310 F.2d 872 (1962), the Court observed that the presumption is, in the absence of substantial evidence to the contrary, that the claim comes within the Act, and that an injury is compensable when it occurs during the normal course of employment. In *Hancock,* as in the case at Bar, the decedent was suffering from an undiagnosed pre-existing coronary disease. Death or fatal injury occuring on the premises of the employer while the employee was performing his usual work gives rise to the presumption that it arose out of his employment. *Smoot Sand & Gravel Co. v. Britton,* 80 U.S. App. D.C. 260, 152 F.2d 17 (1946); *Travelers Ins. Co. v. Cardillo,* 78 U.S. App. D.C. 255, 140 F.2d 10 (1946), and where death of an employee results in the normal course of employment from an illness which takes a sudden turn for the worse and death was not shown by substantial evidence to be unrelated to employment, the statutotry presumption that the claim comes within the Act raises the presumption that death arises out of and in the course of employment. *Robinson v. Bradshaw,* 92 U.S. App. D.C. 216, 206 F.2d 435

(1953), cert. denied, 346 U.S. 899, 74 S. Ct. 226 (1953). Also, if an employee's illness is unrelated to his job, but is aggravated thereby and death results, then the death is the result of an injury within the meaning of the Act. *Hoage v. Employer's Liability Assurance Corp.*, 62 App. D.C. 77, 64 F.2d 715 (1933).

It is also common knowledge that an employer accepts employees subject to their physical infirmities which render them more susceptible to injury than a healthy person, and the protection of the Act is not limited to employees in good health. *President of Georgetown College v. Stone*, 61 U.S. App. D.C. 200, 202, 59 F.2d 875, 877 (1932). An employer takes an employee 'as is,' and if the employee has a pre-existing disease which is accelerated, aggravated, or manifests itself as the result of exertion incidental to the work in which the employee is employed, a compensable injury results even though the exertion would not have harmed a person not suffering from the particular disease. *Trudenick v. Marshall*, 34 F.Supp. 486 (D.C. Wash. 1940). See also *Robinson v. Bradshaw, supra.*

This Court stated in *Commercial Casualty Ins. Co. v. Hoage*, 64 App. D.C. 158, 159, 75 F.2d 677, 678 (1935):

> "***It has been held a number of times, and we think correctly, that an accidental injury may occur notwithstanding the injured is then engaged in his usual and ordinary work***. *It is enough if something unexpectedly goes wrong within the human frame.****" (Emphasis added)

This passage is cited with approval in *Hancock v. Einbinder, supra,* at page 876. In *Wolff v. Britton*, 117 U.S. App. D.C. 209, 328 F.2d 181 (1964), the court stated at p. 185:

> "***The work must bring 'the worker within the orbit of whatever damages the environment affords.'***"

The Court went on to say:

> "***The Supreme Court has emphasized that the test of the statute, just as we have construed it, does not lie in a causal relation between the nature of the employment of the injured person and the accident. Tort principles or common law concepts of the scope of employment are not controlling. What does matter is that the 'obligations or conditions' of employment (must) create the 'zone of special danger' out of which the injury arose."

This Court has in two separate cases reversed the compensation orders in situations involving deaths from heart disease where the Deputy Commissioner had not properly related the deaths of the employees to their particular work. *Hancock v. Einbinder, supra,* (death following employee's regular work of lifting and dragging packages); *Vendemia v. Cristalki,* 95 U.S. App. D.C. 230, 221 F.2d 103 (1955) (death of ornamental iron worker from thrombosis occurring during noon lunch hour).

In *Davison v. Cardillo,* 79 U.S. App. D.C. 121, 143 F.2d 154 (1944), a case where an employee parking lot attendant, dies of heat stroke, the Court said, at p. 155:

> "The heat stroke plainly arose out of the employment. Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is *whether the employment exposes the employee to the risk.*" (Emphasis added)

In view of the aforementioned medical testimony and applicable legal principles and the fact that decedent had a prior existing heart condition, that at the time did not appear active, had commenced working at or about 8:48 A.M. on February 12, 1964, in 40-degree weather with snow on the ground (J.A. 74) and approximately one-and-one-half hours later died; a presumption is raised and supported by medical testimony that something within the above-mentioned time period must have caused

enough strain to precipitate and occasion a myocardial insufficiency to cause death. The record does not reflect any testimony to the contrary. Thus, when the liberal construction of the Act is coupled with the presumption in favor of the deceased employee and is read with the medical testimony and the fact that the Defendant Deputy Commissioner took five months to decide the case, it can only be concluded that the findings of the Defendant Deputy Commission are inconsistent with the spirit and benevolence of the Act and contrary to the settled principles of law and should be reversed and remanded back to said Defendant to enter an award for the Plaintiff.

The uncontradicted testimony offered at trial by Appellant's decedent's Foreman and the medical experts is as follows:

Robert C. Riegel, Foreman

That he is and was employed by Defendant, Associated Transport, Inc., on February 12, 1964, as Shop Foreman and decedent's immediate supervisor. (J.A. 121) That he assigned the decedent the job of removing a tractor wheel and rethreading the axle (J.A. 122) and that decedent had changed his clothes and commenced the required assignment at or about 9:15 A.M. (J.A. 122). Also that decedent, in preparing for the job, had carried his tools to the job location (J.A. 125); however, no one, including Mr. Riegel, could say that they had observed the decedent actually doing physical work on the tractor (J.A. 123), which, in itself, is speculative because no one had actually taken notice, including Mr. Riegel, who was on a conference telephone at the time (J.A. 122, 126). It would necessarily follow that the decedent, who was the best man for the particular assigned job (J.A. 124), somewhat crippled and meticulous in his work (J.A. 125) *had actually commenced the job when he got his tools and laid them out at the tractor wheel*, and, in essence, commenced work. (J.A. 126, 127,

130). *Mr. Riegel could not ascertain the amount of work done or "what tools were there" although he does state that "there were some" tools present* (J.A. 128). The witness did state that even though the acetylene torch, required for the job, was not at the job location, *decedent "had moved the torch"* (J.A. 129).

The company, through Mr. Riegel, *considered the job as started* which is evidenced by their 501 Mechanic's Time Distribution Form which accounts for all labor expended on each vehicle (J.A. 130). This would seem consistent with any job, in that part of a job, especially one of the nature described above, would require carrying heavy tools and moving a torch to the job location, surveying the situation and commencing the task. This is part of the decedent's job and a part that was actually performed by the decedent, and, from Mr. Riegel's and the company's standpoint, they considered it to be "working on the tractor" or job. (J.A. 130).

James E. Chapman, Cardiologist

(As expert in internal medicine
and cardiology, J.A. 76, 77)
ON BEHALF OF THE DECEDENT.

That based on examination of the decedent"s autopsy record and microscopic slides (J.A.77), statements from Plaintiff and Decedent's co-workers, the sudden demise of the decedent was the result of activity performed during decedent's employment (J.A. 96, 97). This was based on a detailed study of the microscopic slides of decedent's heart tissue changes which indicate that the fatal attack began somewhere between one minute (J.A. 97, 98) and one hour from the time of death (J.A. 88, 89, 98), even though there is some conflict as to the exact time of death (J.A. 88, 89, 103). (Also admitted by Defendant on page 4, footnote 2, of Defendant's statement pursuant to Rule 9(h) (App. 30) "Having established

that he couldn't have had an attack beginning more than 45 minutes prior to his death, we have to take the opinion that something happened between 45 minutes before the end of his life, or one hour before the end of his life, and the end of his life which initiated or precipitated a heart seizure," (J.A. 94). Even though the decedent had a prior existing or latent myocardial insufficiency (J.A. 91), this condition "is not necessarily a fatal condition" (J.A. 95), but requires something more (J.A. 99, 101). This would include "straining" (J.A. 99), lifting or "moving a heavy object" (J.A. 90). And if "we assume that" the decedent was a "prudent individual, who if he had been feeling ill or in any way uncomfortable, he would have mentioned it to his Foreman (J.A. 101) at the 9:15 discussion they had concerning the pending job, *"Then something must have happened"* (J.A. 101) *after the decedent commenced his work activity. Therefore, "it was a reasonable probability that this attack began after the 9:15 conference"* (J.A. 107). This reasonable probability is not refuted by Dr. Thomas' testimony.

Lawrence J. Thomas, Physician of the Carrier

(An expert qualified in internal medicine, J.A. 109).

This witness was called on behalf of the Defendant, Associated Transport, Inc. (J.A. 108) and testified that decedent's demise "was not the result of any activity involved in this man's (decedent's) employment." (J.A. 110). However, the only history known to the doctor was through the autopsy report (J.A. 120). He did *not* "see the slides" taken by the Coroner (J.A. 119), even though they could have been made available.

The testimony of Dr. Thomas is not in conflict with that of Dr. Chapman, however, both doctors arrive at different results. If we look at the medical history and information gathered and examined by Dr. Chapman, we find that Dr. Chapman's views are completely supported,

whereas Dr. Thomas finds to the contrary even though he is in agreement with Dr. Chapman and has read *only* the autopsy report. Also, Dr. Thomas adds an additional factor, namely, cold weather, by stating, "... *coronary artery disease is affected adversely by cold,* it produces constriction of blood vessels and it may increase the tendency or the propensity towards heart attacks or sudden death..." (J.A. 111). In further support of Dr. Chapman, the witness goes on to state that, "If there is a proven situation where there has been some unusual stress or strain, this could conceivably help to provoke a heart attack which would result in death." (J.A. 112) . *In the instant case there is a proven situation where the decedent had commenced work, in 40-degree weather.* (Testimony of Riegel, *supra*). Again, at page 124 of his testimony, the witness states, "...unfortunately, you can have severe arteriosclerosis and you can carry on normal activities until something gives way." (J.A. 114). But the witness *could not* pin down a precipitating factor that could have caused death, and, again, agreed with Dr. Chapman's diagnosis (J.A. 115).

At the conclusion of the witness' testimony, the doctor was asked by:

> THE DEPUTY COMMISSIONER: Now many hypothetical questions may have been asked you and illustrations about what may have happened.
>
> But I gather from your testimony that whatever was asked of you, you were not able to specifically say that some certain specific thing that was mentioned was the probable precipitating factor.
>
> THE WITNESS: Nothing except the presence of coronary arteriosclerosis.

Thus, the witness' testimony was a mere affirmation of Dr. Chapman's testimony and a reiteration of the autopsy report, *and he did not refute the Plaintiff's case nor shed any light on the Deputy Commissioner's finding of fact.* The witness was doing nothing more than rendering his employer, Associated Transport, Inc., a beneficial opinion that would aid their cause.

If we view this case in the proper perspective, we can see that the Plaintiff established her case, through medical testimony, and other, as set forth above, that the demise of decedent arose out of and in the course of his employment and was causally related thereto. We cannot lose sight of the fact that, under the statute, the claim is presumed to be valid and that any doubts should be resolved in favor of the employee (decedent) or his dependent family. This principle applies to both issues of law and fact. *Hancock v. Einbinder,* 114 U.S. App. D.C. 67, 310 F.2d 872 (1962); *Friend v. Britton,* 95 U.S. App. D.C. 139, 220 F.2d 820 (1955). It is respectfully contended that the Defendants have not, in any manner, refuted the Plaintiff's claim, either in law or fact, or through medical testimony. Thus, the presumption in favor of a valid claim has not been overborne by Defendants.

The Plaintiff's claim is not based, as Defendant would like this Court to believe, on "the mere fact that death occurred during working hours," but on expert medical testimony, as set forth above and in the transcript (J.A. 76-108), which has not been refuted by medical testimony offered on behalf of Defendant, Associated Transport, Inc. (J.A. 108-120), and also on co-workers' testimony and company report, the prevailing weather conditions, and the physical condition of decedent both before and after he commenced work on February 12, 1964. With all the unrefuted facts coupled with the presumption that the claim is valid, it is respectfully contended that the Deputy Commissioner's finding of fact was unsupported by the evidence and contrary to law.

After all, one might say that cold weather alone could be a precipitating factor causing death, as heat from the sun did in *Davison v. Cardillo,* 79 U.S. App. D.C. 121, 143 F.2d 154 (1944), because by the very nature of the employment in both cases, the employee is exposed to the risk. However, the plaintiff has submitted much more evidence than mere weather conditions or presence at work.

In light of the aforementioned and Plaintiff's Memorandum of Points and Authorities in support of her Motion for Summary Judgment, it is respectfully contended that the findings of the Deputy Commissioner are inconsistent with the evidence and spirit and benevolence of the Act and contrary to settled principles of law applicable to cases of this nature and therefore the findings of the Defendant Deputy Commissioner should be reversed and remanded back to said Defendant to enter an award for the Plaintiff.

In addition, a recent case of this Court, *Butler v. District Parking Management Co.,* No. 19876 (June 8, 1966), succinctly held and has reaffirmed the law set forth in this brief that the employer has the burden of proof, and not the employee, and that where the employer offers no substantial evidence that a workman's injury is not work-related, he does not meet the burden of the statute. In the *Butler* case, we had an almost identical situation to the case at Bar in that the physician testifying on behalf of the employee felt that the breakdown of the employee was caused by the employment and the physician employed by the employer could not tell either way. Under these circumstances, this Court, quite correctly, held that the employer had not met his burden. These are the facts in this case and, under these circumstances, the matter should be remanded to the District Court with instructions to remand it to the Deputy Commissioner to make an appropriate award. In addition thereto, the attention of the Court is respectfully invited to the fact that the Deputy Commissioner took in excess of five months from the date of hearing to render an opinion. This, plus the time spent in the Court below, and the dire need of the widow involved in this matter, indicates that this matter should be promptly considered and that the Court, in the exercise of its supervisory powers

over litigation of this sort, should indicate its disapproval of the conduct of the Deputy Commissioner in holding matters of this nature for such an extended period of time.

Respectfully submitted,

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Attorney for Appellant

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JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY R. WHEATLEY, Surviving Wife of Edward E. Wheatley 12106 Wheatley Lane Beltsville, Maryland Plaintiff	:	
v.	:	CIVIL ACTION No. 354-66
HERMAN ADLER Deputy Commissioner United States Department of Labor Bureau of Employees' Compensation 1111 - 20th Street, N. W. Washington, D. C. and ASSOCIATED TRANSPORT, INC. Self-Insurrer 1936 Montana Avenue, N. E. Washington, D. C. Defendants	:	

RELEVANT DOCKET ENTRIES

Date 1966		Proceedings
Feb.	11	Summons, copies (3) and copies (1) of Complaint issued to D. #1 and deft. ser. 3/1/66; U.S. Atty. ser. 2/16/66; Atty. Gen. ser. 2/18/66; #2 ser. 2/16/66.
Feb.	11	Summons, copies (1) and copy (1) of Complaint issued to D. #2 ser. 2/15/66.
Mar.	8	Answer of defendant #2 to complaint; c/m 3/7/66; appearance Miller, McCarthy, Evans and Cassidy. filed.
Apr.	15	Motion of plaintiff for summary judgment; points and authorities; statement; c/m 4/13/66; M.C. 4/15/66. filed.
Apr.	18	Answer of defendant #1 to complaint; c/m/ 4/18/66; appearance David G. Bress and Ellen Lee Park. filed.

Date 1966	Proceedings
May 31	Cross motion of defendant #1 for summary judgment; points and authorities; statement; transcript; c/m 5/31/66. M.C. filed.
June 22	Opposition of plaintiff to motion of defendant #1 for summary judgment; points and authorities; c/m 6/22/66. filed.
July 28	Order granting motions of defendants for summary judgment and denying motion of plaintiff for summary judgment; dismissing action with prejudice. (N) (AC/N) Curran, J.
Aug. 10	Notice of Appeal filed.

[Filed February 11, 1966]

COMPLAINT TO SET ASIDE COMPENSATION ORDER REJECTING CLAIM FOR DEATH BENEFITS

The plaintiff, Mary R. Wheatley, by and through her attorneys presents to the Court her claim as follows:

1. The jurisdiction of this Court is based upon the provisions of section 21 of the Longshoremen's and Harbor Workers' Compensation Act (Chapter 18, Title 33, U.S. Code), as made applicable to employment in the District of Columbia, by provisions of Title 36, §501, District of Columbia Code, 1964 Edition.

2. Plaintiff is the surviving widow of Edward E. Wheatley, and employee of defendant, Associated Transport, Inc.

3. The defendant, Herman Adler, is a duly appointed Deputy Commissioner for the District of Columbia Compensation District under the said Longshoremen's and Harbor Workers' Compensation Act.

4. On August 31, 1965, the defendant, Herman Adler, in his representative capacity held a hearing which is the subject matter of this claim.

5. On February 2, 1966, the defendant, Herman Adler, in his representative capacity rendered a decision rejecting the claim for death benefits which is the subject matter of this complaint.

6. In said Compensation Order, the Deputy Commissioner made findings of fact contrary to the evidence presented at said hearing.

7. The Compensation Order herein above referred to is based upon erroneous findings of fact and misconceptions of the law in that said claim was rejected on the ground that the death of plaintiff's decedent did not arise out of and in the course of the employment which findings are contrary to the evidence, are unsupported by creditable evidence, contrary to the presumptions of law, and is otherwise erroneous in both fact and law.

8. The extraordinary delay between the time of hearing and the rendition of findings of fact greviously and seriously prejudice the proper claim of plaintiff.

9. The denial and rejection of the claim for death benefits properly due the plaintiff by the defendant, Adler, not being based upon substantial evidence in the record considered as a whole, is not in accordance with law.

WHEREFORE, the premises considered, plaintiff prays:

1. That the record of all proceedings before the Deputy Commissioner in this matter including but not limited to the Compensation Order of February 2, 1966, be certified to this Court.

2. That the said Compensation Order of February 2, 1966, be vacated and set aside and that the matter be remanded to the defendant, Herman Adler, with instructions to award compensation to the plaintiff, or to grant plaintiff such other relief as the nature of the case may require and which to this Court should appear just and proper.

3. That the defendant, Associated Transport, Inc., as a self-insured employer under the provisions of the District of Columbia Workmen's Compensation Act be directed and required to comply with the Compensation Order to be correctly issued by the defendant, Herman Adler.

4. That the Court grant the plaintiff such other and further relief as in the premises and as should appear from the evidence, proper.

/s/ Karl G. Feissner
Attorney for Plaintiff

Of Counsel:

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1420 K Street, N. W.
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RE 7-3740

[Filed March 8, 1966]

ANSWER

Now comes the defendant, Associated Transport, Inc. by its attorney, Joseph S. McCarthy, and for Answer to the complaint filed against it, admits the allegations of paragraph one (1), two (2), three (3), four (4), and five (5); denies the allegations of paragraph six (6), seven (7), eight (8), and nine (9), and for a

FIRST DEFENSE states that the findings of the initial Deputy Commissioner are supported by substantial evidence and are accordingly correct.

Respectfully submitted,

MILLER, McCARTHY, EVANS
& CASSIDY

304 Ring Building
Washington, D. C.

/s/ Joseph S. McCarthy
Attorney for Defendant,
Associated Transport Inc.

[Certificate of Service]

[Filed April 15, 1966]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Mary R. Wheatley, surviving wife and widow of Edward E. Wheatley, deceased, through her counsel and respectfully moves this Court to grant summary judgment in her favor, reversing the finding of the defendant, Herman Adler, Deputy Commissioner, U.S. Department of Labor, Bureau of Employees' Compensation, that the death of said decedent on February 12, 1964, did not arise out of and in the course of his employment and remand this cause back to the defendant deputy commissioner to enter an award of compensation to plaintiff against defendant, Associated Transport, Inc. For cause counsel refers to the stenographic transcript of the hearing in this matter and the attached memorandum of points and authorities

For these and such other reasons that may be advanced at the oral hearing, the plaintiff prays the Court that she be granted summary judgment.

/s/ Karl G. Feissner
Attorney for plaintiff

Of counsel:

ALPERN & FEISSNER
1420 K Street N. W.
Washington, D. C.
RE 7-3740

/s/ Daniel C. Smith
Attorney for plaintiff

[Certificate of Service]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

This cause arises out of plaintiff's complaint to set aside the compensation order filed by the defendant, deputy commissioner on February 2, 1966, pursuant to the provisions of the Longshoreman's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. A. §901 *et seq.*, as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code §36-501 (1961 Ed.)

STATEMENT OF FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

On February 12, 1964, the decedent, Edward E. Wheatley, was in the employ of defendant, Associated Transport, Inc., in the District of Columbia. The decedent has been employed by the defendant for 17 years as a truck mechanic. At or about 8:48 A. M. on the above date, the decedent reported to work and proceeded to go about his normal and usual work assignments. On this particular day, the decedent was ordered by his supervisor Robert C. Riegel, shop foreman, to remove a tractor wheel and rethread the axle. After commecning the job, the decedent left the shop for a private purpose and upon his returning, the decedent collapsed and died at or about 10:22 A. M. as set forth in the autopsy report, Commissioner's Exhibit No. 2.

The claim for compensation was filed on behalf of decedent's wife, Mary R. Wheatley, plaintiff herein, as set forth in Commissioner's Exhibit No. 1. The immediate cause of decedent's death was found to be myocardial insufficiency due to acute heart disease. (Death Certificate, Commissioner's Exhibit No. 3)

A hearing was held on August 31, 1965. On February 2, 1966, five months after, the defendant deputy commissioner rendered his decision rejecting plaintiff's compensation claim, and for reasons stated, "That the collapse and the death of the employee on February 12, 1964, did not arise out of and in the course of the employment." It is from this finding that plaintiff is appealing to this Court.

QUESTIONS PRESENTED

1. That the finding of the defendant, deputy commissioner, was unsupported by the facts and contrary to law.

2. That the medical testimony set forth below and in the official record clearly establishes that decedent's demise was precipitated by the employment and that his death arose out of and in the course of his employment.

MEDICAL TESTIMONY

The medical evidence and testimony support plaintiff's contention that the death arose out of and in the course of decedent's employment. Dr. James Chapman, a specialist in internal medicine and cardiology (T.63-64) testifying on behalf of the plaintiff, found after a microscopic study of the decedent's heart tissue no changes from normal (T.79) which means that decedents attack had occurred within one hour before death. (T.82) The decedent's activities on the morning of February 12th, were normal (T.80). His activities for three or four days prior to death were usual and normal (T.88). The time of death was at or about 10:22 A. M. (T.107) and decedent reported to work at or before 8:48 A. M. as his time card was punched at this hour (T.102). All the medical testimony points to the fact that a precipitating cause of decedent's demise must have occured while decedent was employed and working in the usual course of his employment. (T.97, 101, 103, 105, 109, 112-114) This position is uncontroverted by defendant, Associated Transport's medical testimony as stated by Dr. Lawrence J. Thomas. (T.119, 124, 125-126, 128)

DISCUSSION OF APPLICABLE LAW

It is respectfully contended that the findings of the defendant, deputy commissioner, are unsupported by the evidence and inconsistent with the Code and case law governing claims filed under the Longshoreman's and Harbor Worker's Compensation Act, and adopted in the District of Columbia under Title 36, Section 501 and 502 of the D.C. Code (1961 Ed.) hereinafter known as the Act.

THE ACT

In construing and interpreting the Act the courts have uniformly held that workmen's compensation laws should be construed most liberally in favor of the injured employee and his dependents. *Voris v. Eikel,* 346 U.S.

328, 74 S.Ct.88 (1953) *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 72 S.Ct.223 (1952) *Robinson v. Bradshaw*, 92 U.S. App. D.C. 216, 206 F.2d 435 (1953), Cert. denied 346 U.S. 899, 74 S.Ct.226.

The Court of Appeals for this Circuit has held that doubts should be resolved in favor of the employee or his dependent family. *Robinson v. Bradshaw, supra; Travelers Ins. Co. v. Donovan* 95 U.S. App. D.C. 331, 221 F.2d 886 (1955); *Phoenix Assurance Co. v. Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961). This principle has also been applied to both issues of law and issues of fact. *Friend v. Britton*, 95 U.S. App. D.C. 139, 220 F.2d 820 (1955); *Hancock v. Einbinder*, 114 U.S. App. D.C. 67, 310 F.2d 872 (1962); *London Guarantee & Accident Co., v. Hoage*, 64 App. D.C. 105, 75 F.2d 236 (1934).

In light of the uncontradicted medical testimony, as set forth above, namely, that decedent's attack was precipitated by something that occurred while acting within the scope of his employment, (T.103, 105, 109, 112-114) when viewed within the liberal and humanitarian construction of the Act, it would seem that the five month doubt of the defendant, deputy commissioner should be resolved in favor of the plaintiff.

APPLICABLE LAW

The Court's attention is invited to what is believed to be the applicable law in cases such as this:

In *Hancock v. Einbinder*, 114 U.S. App. D.C. 67, 310 F.2d 872 (1962), the court observed that the presumption is, in the absence of substantial evidence to the contrary, that the claim comes within the Act, and that an injury is compensable when it occurs during the normal course of employment. In *Hancock* as in the case at bar, the decedent was suffering from an undiagnosed pre-existing coronary disease. Death or fatal injury occurring on the premises of the employer while the employee was performing his usual work gives rise to the presumption that it arose out of his employment. *Smoot Sand & Gravel Co., v. Britton*, 80 U.S. App. D.C. 260, 152 F.2d 17

(1946); *Travelers Ins. Co. v. Cardillo*, 78 U.S. App. D.C. 255, 140 F.2d 10 (1946), and where death of an employee results in the normal course of employment from an illness which takes a sudden turn for the worse and death was not shown by substantial evidence to be unrelated to employment, the statutory presumption that the claim comes within the Act raises the presumption that death arises out of and in the course of employment. *Robinson v. Bradshaw*, 92 U.S. App. D.C. 216, 206 F.2d 435 (1953) Cert. denied 346 U.S. 899, 74 S.Ct. 226. Also, if an employees illness is unrelated to his job, but is aggravated thereby and death results, then the death is the result of an injury within the meaning of the Act. *Hoage v. Employer's Liability Assurance Corp.* 62 App. D.C. 77 (1933).

It is also common knowledge that an employer accepts employees subject to their physical infirmities which render them more susceptible to injury than a healthy person and the protection of the Act is not limited to employees in good health. *President of Georgetown College v. Stone*, 61 App. D.C. 200, 202, 59 F.2d 875, 877 (1932). An employer takes an employee 'as is'. and if the employee has a pre-existing disease which is accelerated, aggravated, or manifests itself as the result of exertion incidental to the work in which the employee is employed, a compensable injury results even though the exertion would not have harmed a person not suffering from the particular disease. *Trudenick v. Marshall*, 34 F.Supp. 486 (D.S. Wash.1940) See also *Robinson v. Bradshaw, supra.*

The Circuit Court stated in *Commercial Casualty Ins. Co. v. Hoage*, 64 App. D.C. 158, 159, 75 F.2d 677, 678 (1935):

> "***It has been held a number of times, and we think correctly, that an accidental injury may occur notwithstanding the injured is then engaged in his usual and ordinary work***. *It is enough if something unexpectedly goes wrong within the human frame.****" (Emphasis added)

This passage is cited with approval in *Hancock v. Einbinder, supra,* at page 876. In *Wolff v. Britton*, 328 F.2d 181 (D.C. Cir 1964), the court stated at p. 185:

> "***The work must bring "the worker within the orbit of whatever damages the environment affords".***"
> (Citing *Hartford Accident & Indemnity Co. v. Cardillo*, 72 App. D.C. 52, 55, 112 F.2d 11, 14, cert.denied, 310 U.S. 649, 60 S.Ct.1100 (1940))

The Court went on to say:

> "***The Supreme Court has emphasized that the test of the statute, just as we have construed it, does not lie in a causal relation between the nature of the employment of the injured person and the accident. Tort principles or common law concepts of the scope of employment are not controlling. What does matter is "that the 'obligations or conditions' of employment [must] create the 'zone of special danger' out of which the injury arose."

The Court of Appeals for this circuit has in two separate cases reversed the compensation orders in situations involving deaths from heart disease where the deputy commissioner had not properly related the deaths of the employees to their particular work. *Hancock v. Einbinder, supra,* (death following employee's regular work of lifting and dragging packages); *Vendemia v. Cristalki,* 95 U.S. App. D.C. 230, 221 F.2d 103 (1955) (death of ornamental iron worker from thrombosis occurring during noon lunch hour).

In *Davidson v. Cardillo,* 143 F.2d 154 (D.C. Cir. 1944) a case where an employee, parking lot attendant, died of heat stroke, the Court said, at p.155:

> "The heat stroke plainly arose out of the employment. Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is *whether the employment exposes the employee to the risk."* (Emphasis added)

In view of the aforementioned medical testimony and applicable legal principles and the fact that decedent had a prior existing heart condition, that at the time did not appear active, had commenced working at or about 8:48 A.M. on February 12, 1964, in 40 degree weather with snow on the ground (T.61) and approximately one and one half hours later died; a

presumption is raised and supported by medical testimony that something within the above mentioned time period must have caused enough strain to precipitate and occasion a myocardial insufficiency to cause death. The record does not reflect any testimony to the contrary. Thus, when the liberal construction of the Act is coupled with the presumption in favor of the deceased employee is read with the medical testimony and the fact that the defendant, deputy commissioner took five months to decide the case, it can only be concluded that the findings of the defendant deputy commissioner are inconsistent with the spirit and benevolence of the Act and contrary to the settled principles of law and should be reversed and remanded back to said defendant to enter an award for the plaintiff.

Respectfully submitted,

/s/ Karl G. Feissner
Attorney for Plaintiff

/s/ Daniel C. Smith
Attorney for Plaintiff

[Filed April 18, 1966]

ANSWER OF DEFENDANT DEPUTY COMMISSIONER

Defendant, Herman Adler, Deputy Commissioner, Bureau of Employee's Compensation, United States Department of Labor, for his answer to the complaint herein:

1. Admits the allegations contained in paragraphs numbered 1, 2, 3, 4, and 5.

2. Denies the allegations contained in paragraphs numbered 6, 7, 8, and 9.

3. For a further defense, defendant deputy commissioner alleges that the compensation order complained of is in all respects in accordance with law.

WHEREFORE, defendant deputy commissioner prays that the complaint be dismissed.

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ ELLEN LEE PARK
Assistant United States Attorney

Attorneys for Defendant Adler

[Certificate of Service]

[Filed May 31, 1966]

DEFENDANT DEPUTY COMMISSIONER'S CROSS MOTION FOR SUMMARY JUDGMENT

Defendant deputy commissioner, Herman Adler, Bureau of Employees' Compensation, United States Department of Labor, moves the Court to sustain his compensation order herein appealed by plaintiff, Mary R. Wheatley, and to enter judgment for the defendant, dismissing the complaint, on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment on the record as a matter of law.

This motion is addressed to the complaint's assignments and specifications of error alleged to have been committed by defendant deputy commissioner, and is based upon the attached certified copy of the transcript of

proceedings held before the defendant as Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, on August 31, 1965, in the matter of Edward E. Wheatley, Case No. 127-277 F, together with exhibits therein.

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANNON
Assistant Unites States Attorney

/s/ ELLEN LEE PARK
Assistant United States Attorney

Attorneys for Defendant Adler

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

STATEMENT OF CASE

This is an appeal by plaintiff, widow of Edward E. Wheatley (hereinafter referred to as "employee"), seeking reversal of the defendant deputy commissioner's rejection of the plaintiff's claim for workmen's compensation benefits. The cause arises upon a complaint to review and set aside, as not in accordance with law, a compensation order filed by Herman Adler, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, on February 2, 1966, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code 36-501.

In his order, the deputy commissioner rejected the claim of plaintiff for the reason that the death of the employee did not arise out of and in the

course of the employment. The complaint alleges, in effect, that the record does not support the deputy commissioner's finding.

Because of the appellate character of the present action, brought solely to determine whether the deputy commissioner's findings are supported by the transcribed evidence of the proceedings before him, no genuine issue of fact is involved for determination by the Court. Accordingly, the action is one properly to be disposed of through the office of motions for summary judgment filed by plaintiff and the deputy commissioner.

THE COMPENSATION ORDER

The compensation order complained of reads, in pertinent part, as follows:

> Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

1. That on February 12, 1964, Edward E. Wheatley, hereinafter referred to as "employee", was in the employ of the employer above named, whose address is 1936 Montana Avenue, Northeast, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was protected by the said employer's qualifying as a self-insurer;

2. That the employment of the employee by the employer was as a mechanic;

3. That at 8:48 a.m. on February 12, 1964 the employee reported for duty with the employer; that approximately at 9:15 a.m. on the said day after he had

changed into his work clothes, the employee was instructed by the shop foreman, his immediate superior in the employment, to repair a wheel bearing on a tractor in the shop; that in order to perform this task, the employee was required first to cut off two wheel nuts with an acetylene torch before he could execute any other detail of the assignement; that after taking a hammer, chisel and a pair of pliers from his tool box and placing them alongside of the subject tractor and before securing an acetylene torch the employee walked out of the shop into the back yard for a private purpose; that at 9:30 a.m. or a few minutes thereafter while approximately 40 feet from and on his way back to the shop, the employee collapsed and was pronounced dead at 10:22 a.m. on the same day at the Casualty Hospital;

4. That on November 13, 1964 the employee's widow, Mrs. Mary R. Wheatley, filed claim against the employer for death benefits under the District of Columbia Workmen's Compensation Act, alleging that the death of the employee resulted from his employment;

5. That on said morning, prior to the employee's collapse, neither the employee's wife, the claimant herein, or any one of his co-workers or his supervisor had heard the employee complain of any physical distress or illness, nor did claimant's appearance on that morning suggest to any one of them that he was suffering from an ailment; that on the morning of his collapse and death the employee, except for gathering some hand tools, as found above, had not started as yet to perform any specific work detail of his assignment; that on the said morning the employee was not subject to any employment-related emotional disturbance or to any significant physical exertion.

6. That the employee suffered from advanced arteriosclerotic heart disease; that such affliction preexisted his collapse on the morning of February 12, 1964; that the collapse and sudden death of the employee was caused by a myocardial insufficiency due to the advanced arteriosclerotic heart disease; that the myocardial insufficiency was neither caused nor aggravated by the employment on February 12, 1964 or prior thereto; that the collapse and death of the employee were not causally

> related to the circumstances of the employment but was attributable to the myocardial insufficiency which resulted from the natural progression of the arteriosclerotic heart disease; that the collapse and death of the employee did not arise out of and in the course of the employment on February 12, 1964 or prior thereto.
>
> Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for death benefits be and it hereby is REJECTED for the following reason:
>
> That the collapse and the death of the employee on February 12, 1964 did not arise out of and in the course of the employment.

QUESTION PRESENTED

The question presented in this review proceeding is whether the record, considered as a whole, supports the deputy commissioner's finding that the employee's death was not associated with his employment but, instead, was due to natural causes unrelated to the employment.

ARGUMENT

> *The deputy commissioner's finding that the death of the employee was not employment related is supported by the record considered as a whole.*

(a) Scope of Review

The standard for judicial review in cases arising under the Longshoremen's Act has been carefully delineated by the Supreme Court. If the findings of the deputy commissioner are supported by substantial evidence, *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951), or if the deputy commissioner's holding is not irrational, *O'Keeffe v. Smith, Hinchman & Grylls*, 380 U.S. 359, 363 (1965), or if the order under review is not "forbidden by the law", *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947), the decision of the deputy commissioner is to be sustained. The fact that the evidence may permit the drawing of diverse inferences will not

warrant disturbing the inference or inferences drawn by the deputy commissioner if his selection is reasonable. *Cardillo v. Liberty Mutual Insurance Co., supra; Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Ins. Co.,* 288 U.S. 162 (1933).

These principles have found acceptance by the Court of Appeals for the District of Columbia in numerous cases under the Longshoremen's Act. *Wolff v. Britton,* 117 U.S. App. D.C. 209, 328 F.2d 181 (1964); *Phoenix Assurance Company v. Britton,* 110 U.S. App. D.C. 118, 289 F.2d 784 (1961), *General Accident Fire & Life Assurance Corporation v. Britton,* 103 U.S. App. D.C. 135, 255 F.2d 544 (1958); *Liberty Mutual Insurance Co. v. Britton,* 100 U.S. App. D.C. 236, 243 F.2d 659 (1957); *United States Fidelity & Guaranty Co., v. Britton,* 88 U.S. App. D.C. 293, 188 F.2d 674 (1951).

A review of the record in the instant case discloses that the deputy commissioner's order should be sustained.

(b) The Evidence

The record in the instant case consists of the typewritten transcript of the administrative hearing held before the deputy commissioner on August 31, 1965, with exhibits, and is attached to defendant deputy commissioner's cross motion for summary judgment.

A summary of the evidence of record appears in defendant's statement pursuant to Rule 9(h) of the Local Civil Rules, and that summary is incorporated herein by reference.

(c) Discussion

The deputy commissioner's task in the instant case was to decide from the evidence in the record, and the inferences to be drawn therefrom, whether the employee's death from myocardial insufficiency due to arteriosclerotic heart disease was or was not associated with his employment.

It was solely within the province of the deputy commissioner, as trier of the facts, to determine the credibility of witnesses; he could disbelieve any part or all of the evidence presented according to his judgment of its

truthfulness and reliability: *Associated General Contracters v. Cardillo*, 70 App. D.C. 303, 106 F.2d 237 (1939); *Kwasizur v. Cardillo*, 175 F.2d 235 (C.A. 3, 1949), cert. den. 338 U.S. 880; *Gooding v. Willard*, 209 F.2d 913 (C.A. 2, 1954); *Wilson & Co. v. Locke*, 50 F.2d 81 (C.A. 2, 1931); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (C.A. 2, 1961); *Hudnell v. O'Hearne*, 99 F.Supp. 954 (Md. 1951).

The rule as to acceptance upon judicial review of the deputy commissioner's evaluation of the credibility of witnesses applies also to medical witnesses: *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (C.A. 5, 1962); *John W. McGrath Corp. v. Hughes, supra*, 289 F.2d 403 (C.A. 2, 1961); *Gooding v. Willard, supra*, 209 F.2d 913 (C.A. 2, 1954). With respect to any conflict in the medical testimony offered by the parties, a deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence: *Todd Shipyards Corp. v. Donovan, supra*, 300 F.2d 741 (C.A. 5, 1962); *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76 (C.A. 4, 1958); *Baltimore & O. R. Co. v. Clark*, 56 F.2d 212 (Md. 1932); *Jarka Corporation of Philadelphia v. Norton*, 56 F.2d 287 (Pa. 1930); *Liberty Stevedoring Co. v. Cardillo*, 18 F.Supp. 729 (N.Y. 1937); *Zurich General Accident & Liability Ins. Co., Ltd. v. Marshall*, 42 F.2d 1010 (Wash. 1930); *Ryan Stevedoring Co. v. Norton*, 50 F.Supp. 221 (Pa. 1943); *Liberty Mutual Ins. Co. v. Marshall*, 57 F.Supp. 177 (Wash. 1944), aff'd 151 F.2d 1007 (C.A. 9, 1945); *Contractors PNAB v. Pillsbury*, 150 F.2d 310 (C.A. 9, 1945); *Crescent Wharf & Warehouse Co. v. Cyr*, 200 F.2d 633 (C.A. 9, 1952); *Marine Operators v. Barnhouse*, 61 F.Supp. 572 (Ill. 1944); cf. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

It is readily apparent from the evidence outlined above that the deputy commissioner in the instant case had ample warrant in the record for his determination that there was no causal relationship between the work of the deceased (either as an original, precipitating or aggravating activity or force) and his physical condition and death resulting from myocardial

insufficiency. The record contains undisputed evidence to the effect that the employee reported for work on the morning in question at 8:48 a.m., changed into his work clothes and was given a work assignment about 9:15 or 9:20 a.m. by the shop foreman. The record further shows, without dispute, that the only activity of the employee was to remove his hand tools preparatory to doing the assigned job. The job itself, however, had never been started.

The record also contains medical-opinion evidence to the effect that the death of the employee was not the result of any activity associated with his employment; and the physician who testified on behalf of the claimant admitted in effect under cross examination that the employee could have suffered his fatal attack even though he might have been "sitting or even sleeping" just prior to the attack. In effect, he related death to employment solely by reason of the fact that the employee's fatal heart attack had occurred on the employment premises. The locale of the attack alone was to him sufficient to place responsibility on the employer and carrier even though no physical employment activity may have resulted in the death which was the terminal aspect of a pre-existing arteriosclrotic condition.

While workmen's compensation laws will be liberally construed, it should be noted that in cases such as this there is no presumption of compensability arising from either the mere occurrence of an injury or the mere showing of disability or death, without more. It is essential for claimant to do more than present an application for payment. He must, instead, show to the satisfaction of the trier of the facts that disability or death, or both, are causally related to the employment. The presumption of Section 20(a) of the Longshoremen's Act, 33 U.S.C. 920(a), that a "claim" comes within the Act requires some showing of the existence of facts supportive of a claim for compensation. There is no presumption in favor of compensability.

Hines v. Pacific Mills, 214 S.C. 125, 51 S.E. 2d 383 (1940). A claimant must still establish his claim of compensability. It is still the law that the burden is on him to prove the facts entitling him to an award of compensation, and this burden does not shift.

The extent of the effect to be given the Act's presumption has been carefully delineated by the Supreme Court. Thus, in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), where the evidence was even stronger than in the instant case in favor of compensability, the Court sustained the deputy commissioner's denial of death benefits despite the presumption in language appropriate to the instant case (pp. 286-287):

> ... The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this *prima facies*. The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. *Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.* If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, *the issue must be resolved upon the whole body of proof pro and con; and it it permits an inference either way upon the question of suicide, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the Court.*

For these reasons we are of opinion the Court of Appeals erred in holding that as the evidence on the issue of accident or suicide was, in its judgment, evenly balanced, the presumption must tip the scales

> in favor of accident. The *only matter for decision was whether the affirmative finding of suicide was supported by evidence*. It is clear that it *was* so supported and that the court should therefore not have set aside the Deputy Commissioner's order. (Emphasis supplied.)

In the instant case, as in the cited case, there was no "lack of competent evidence", lay and medical, supportive of the employer's position that death was due to causes unrelated to the employee's work. Accordingly, the presumption of the Act "falls out of the case" and permits "an inference either way" by the deputy commissioner upon the question of the association of death with the employee's work. As in *Del Vecchio*, there was affirmative evidence of the lack of such association.

Numerous cases showing that there is no presumption of compensability arising from the mere occurrence of injury or death during employment are cited under Key Nos. 1339 and 1362, "Workmen's Compensation", American Digest System. A large number of the decisions on this point have gone to the extent of spelling out or specifying in detail the obligation on the part of claimants. See *Central E. & C. Co. v. Rossano,* 75 R.I. 108, 64 A.2d 197 (1949) (where, in a disability case, it was stated that the mere showing of inability to work is insufficient to support a claim for compensation). Many of these decisions state in various ways that an award of compensation may not be made on the basis of conjecture or speculation and that the claimant must prove all factors or elements essential to a compensable claim: *Robertson v. North American Refractories,* 169 Md. 187, 181 A. 223 (1935); *Conquy v. New Jersey P. & L. Co.,* 23 N.J. Super. 325, 93 A.2d 23 (1953); *Houle v. Tondreaux Bros. Co.* (no State citation available), 91 A.2d 481 (Me. 1953); *Weirton Coal Co. v. Mishawake R. & W. Co.,* 119 Ind. 309, 84 N.E. 2d 897 (1949); *Broughton v. South Carolina G. & F. Dept.,* 219 S.C. 50, 64 S.E. 152 (1951); *Roberts v. M.S. Carrol Co.,* 68 *So.*2d 689 (La. App. 1953); *Wiltse v. Borden's Farm Products Co.,* 328 Mich. 257, 43 N.W.2d 842 (1951).

Two Wisconsin cases phrase the standard of proof required of a claimant in terms of dispelling any "legitimate doubt" in the mind of the compensation agency: *Dentrice v. Ind. Comm.*, 254 Wis. 159, 35 N.W.2d 218 (1949); *Skelly v. Ind. Comm.*, 254 Wis. 315, 36 N.W.2d 58 (1949). And in *Lopez v. Kennecott Copper Corp.*, 71 Ariz. 212, 225 P.2d 702 (1950), the court said that the claimant must show affirmatively that he is entitled to compensation, that the commission is not required to disprove claimant's contention, and that if reasonable men could reach different conclusions from the evidence the decision of the commission has the same force as the verdict of a jury. For other cases adhering to this principle, see *Rogers v. Williams*, 196 Va. 39, 82 S.E.2d 601 (1954); *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954); *Reeves Motor Co. v. Reeves*, 204 Md. 576, 105 A.2d 236 (1954); *McCaleb v. Greer*, 267 S.W.2d 54 (Mo. App. 1954); *Rick v. Ind. Comm.*, 266 Wis. 460, 63 N.W.2d 712 (1954).

Disability or death from some disease or consequence of such disease which is unrelated to some industrial mishap (as was here testified to) is not compensable. There is in fact a presumption that such a diseased condition *is idiopathic* as to both origin and development. *Macko v. Raritan Valley Farms*, 131 N.J.L. 283, 35 A.2d 872 (1944), holding that the burden was on claimant to establish that brain injury with symptoms of subarachnoid bleeding shown by yellowish discolored brain tissue was not idiopathic and that the burden to establish an industrial accident is the *sine qua non* for recovery. Also see *Black v. Mahoney Troast Const. Co.*, 168 A.2d 62 (N.J. Super. 1962).

Where such a *presumption* of ideopathic cause may or may not be said to exist under the Longshoremen's Act in a case such as the instant one is immaterial to decision here; for there was affirmative evidence that the fatal attack was the result of natural progression, unaffected by the employment where the day's activities had not yet commenced for the deceased. What is important is that the burden to establish industrial compensability is on claimants, and this the present claimant has failed to do to the satisfaction of the deputy commissioner.

In addition, it should be remembered that judicial review of a deputy commissioner's rejection of a claim, based as it must be upon *all* the evidence of record introduced by *both* adversaries, involves a somewhat different viewing of the evidence from review of an award of compensation by him. In the latter case there must be affirmative evidence in the record before the deputy commissioner to support the award; in the former, on the other hand, affirmative evidence is not needed since, upon failure of a claimant to carry the burden of proof in support of his claim, the deputy commissioner must reject the claim notwithstanding an absence of affirmative evidence to disprove or negate it. In other words, it is not necessary for the employer to prove a negative. *Gooding v. Willard,* 209 F.2d 913 (C.A. 2, 1954); *Kwasizur v. Cardillo,* 175 F.2d 235 (C.A. 3, 1949), cert. den. 338 U.S. 880. The rejection follows the claimant's failure to establish his claim. In the *Gooding* case, the court at page 916 said:

> We might let decision turn on the above, but it should also be noted that *the burden to show that the accident was a contributing cause of the death was on the appellee.* It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, *the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged.* The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show affirmatively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision it was error to set it aside. (Emphasis supplied.)

From the foregoing discussion it is apparent that not every injury or death which occurs during the course of employment (which refers to time and place) may be said, *ipso facto,* to arise out of the employment (which

refers to causation or aggravation resulting in disability or death). To be compensable, both factors must exist.[1] When, as here, affirmative evidence exists that the disability or death was not associated with the employment, the decision of the deputy commissioner is to be sustained. Particularly is this true, under the *Gooding* case's principle, with respect to rejection of claims and the ultimate burden-of-proof requirement imposed on claimants. In the presence of evidence such as that contained in this record it cannot be said that the mere fact that death occurred during working hours (though no actual assigned work had yet commenced) will not, in the face of evidence that death was unrelated to the employment, warrant reversal of the deputy commissioner's determination on judicial review.

Thus, in *Wolff v. Britton*, 117 U.S. App. D.C. 209, 328 F.2d 181 (1964), where death occurred on the employment premises as the result of the deceased having struck his head on the floor following a non-employment related seizure, the Court, in upholding the deputy commissioner's rejection of death benefits, significantly said (p. 184):

> Whether or not a seizure produces a compensable injury . . . would seem to turn on [the employee] having encountered some occupational hazard, or at least the *injury must have beenrelatedto his work* . . . .
>
> . . . .
>
> The supreme Court has emphasized that the test of the stature, just as we have construed it, does not lie in a causal relation between the *nature* of the employment of the injured person and the accident. Tort principles or common-law concepts of the scope of employment are not controlling. What does matter is that the 'obligations or conditions' of employment [must] create the 'zone of *special* danger' out of which the injury arose".
>
> Here the deputy commissioner drew the inference from all of the facts as found that the injury suffered by the appellant's decedent did not arise out of his em-

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[1] See Section 2(2) of the Longshoremen's Act, 33 U.S.C. 2(2) which defines injury as meaning "accidental injury or death arising out of and in the course of employment".

> ployment. Accordingly he concluded in a record which supports him that the claim was not compensable. Since "there is factual and legal support for that conclusion, our task is at an end" . . .

Here, too, there being evidence that the employee's heart attack or seizure was neither caused by nor related to any condition of his employment, it is submitted that this Court's task is likewise at an end.[2] For certainly it cannot be said that the deputy commisioner was, on the record evidence here, "compelled" to accept the claimant's version and award compensation, *O'Leary v. Brown-Pacific-Maxon,* 340 U.S. 504 (1951). Nor can it be said that the deputy commissioner's conclusion was "irrational", *O'Keeffe v. Smith, Hinchman & Grylls,* 380 U.S. 359 (1965), or "forbidden by the law", *Cardillo v. Liberty Mut. Ins. Co.,* 330 U.S. 469 (1947).

The complaint alleges, without any attempted specification (paragraph 8) that delay between the date of hearing and the date of the deputy commissioner's decision did "grievously and seriously prejudice" his claim. It should be obvious that delay would not, of itself, authorize the Court to order the deputy commissioner to issue an award for that reason. Further, for want of specificity, the complaint asks the Court to speculate as to how delay may have caused the rejected compensation claim to deteriorate. One is asked to speculate unfavorably on the possibility of other administrative pressures having resulted in the delay and to assume the existence of some form of bad faith on the part of the deputy commissioner. And one is asked to overlook the judicial precedent of the Court of Appeals for this Circuit which has held that the time requirement in the Act (Section 19(c), 33 U.S.C. 919(c)) for rendition of decisions by deputy commissioners is but directory, not mandatory or jurisdictional. *Maryland Casualty Co. v. Cardillo,* 69 App. D.C. 199, 99 F.2d 432 (1938); accord, *Candado v. Willard,* 185 F.2d 232 (C.A. 2, 1950).

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[2] In the cited case, one might even better argue for compensability than here since death was due to a fractured skull sustained when the employee struck the employer's concrete floor. Yet even this striking was not regarded as a "special danger" as a matter of pure law.

CONCLUSION

In view of the above, it is respectfully submitted that the compensation order complained of is in accordance with law and that judgment should be granted in favor of the defendant deputy commissioner dismissing the complaint.

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ ELLEN LEE PARK
Assistant United States Attorney

Attorneys for Defendant Adler

/s/ CHARLES DONAHUE
Solicitor of Labor

/s/ ALFRED H. MYERS
JAMES EDWARD HUGHES
Attorneys

U.S. Department of Labor

Of Counsel

[Filed May 31, 1966]

STATEMENT PURSUANT TO RULE 9(h) OF THE LOCAL CIVIL RULES

The defendant deputy commissioner, Herman Adler, makes the following statement pursuant to Rule 9(h) of the Local Civil Rules:

1. This is a proceeding for judicial review of a compensation order filed under the District of Columbia Workmen's Compensation Act. There

is no issue of fact. There is only a question of law; namely, whether the findings in the compensation order are supported by the evidence in the record made before the deputy commissioner. If the record supports the findings, then defendant is entitled to judgment dismissing the complaint as a matter of law.

2. The material facts as to which defendant deputy commissioner contends there is no genuine issue are as follows:

(a) The filing of a claim for compensation (death benefits) by Mary R. Wheatley as the widow of Edward E. Wheatley

(b) The hearing held by the defendant deputy commissioner with respect to this claim on August 31, 1965, in the matter of Edward E. Wheatley, deceased employee, Case No. 127-227 F.

(c) The filing by the deputy commissioner of his findings of fact as set forth in the compensation order here under review.

(d) The transcript of the aforesaid hearing, which constitutes the record in this case and which contains the following facts in support of the defendant deputy commissioner's compensation order.

With reference to the sole issue that is the subject of review in the present proceeding, namely, whether the employee's death was employment related, witnesses testified in part and in effect as follows:

ROBERT C. RIEGEL: That he was employed by Associate Transport in February of 1964 as shop foreman (T. 134-135); that, in this capacity, Edward Wheatley, the employee, came under his supervision and control; that, on the day of the employee's death (February 12, 1964), the employee arrived at work "around a quarter to nine [a.m.]" (T. 135); that the witness assigned the employee a job cutting two wheel nuts off an axle tube, by means of a cutting torch; that thereafter , the employee was to remove the wheel and rethread the axle; that the witness "got on the conference line at 9:30", this conference line being one used by shop foremen from various state areas to report to a central maintenance office; that

the line is used every morning at 9:30 (T. 136); that the witness had given the employee his work assignment 10 or 15 minutes prior to 9:30 a.m. on the day in question (T. 136-137); that the employee had changed into his work clothes prior to the time he received his assignment; that the employees punched in first, changed into their work clothes, and then got their work assignments; that the work assignment was given to the employee some 10 or 15 minutes before the witness got on the conference line at 9:30; that the work of the employee was to be done "right in the shop" (T. 137); that the vehicle upon which it was to be done was in the shop at the time the witness made the assignment to the employee; that the employee thereafter "passed out in the yard; that the witness examined the truck and noted that the employee had not even lit nor moved the torch into place to start the job (of cutting off two wheel nuts) (T. 138, 148-149); that the wheel which was to have been removed (after the cutting) was still on the truck (T. 138-139); that the work was to have been on one wheel only; that from what appeared from the truck itself, none of the assigned work had been done, (T. 139, 148); that when the witness learned of the employee's (heart) attack he arranged for an ambulance, went out (in the yard), covered the employee with a coat, and checked his pulse; that he "couldn't find any pulse" (T. 139); that when he had spoken to the employee about 10 or 15 minutes before the witness got on the conference line the employee "appeared normal", nothing abnormal was noted (T. 140, 147-148); that the employee made no complaint about not feeling well nor any comment about not feeling up to doing the assigned work (T. 140); that the employee had done "nothing that was noticeable" to carry out his assignment on the truck before he had his attack other than having gotten the (hand) tools, which "we put . . . away later", in preparation of getting started on the job (T. 141); that, with reference to a statement in the Joint Exhibit No. 1 by a security investigator to the effect that the witness had informed the investigator that after the employee's 9:15 a.m. conversation with the witness, the employee "proceeded to the tractor and was working on the tractor the last time" that he saw the employee; the witness merely meant that the employee's work time had started

as of the time of the assignment of the job for purposes of affixing cost charges to the particular vehicle; that this procedure was a management matter (T. 142-143, 149-150); that the witness considered the employee's getting his tools out (the tools being needed only after the torch burning, T. 146) as working on the tractor (for this cost purpose) (T. 149).

LAWRENCE J. THOMAS, M.D. (an internist with practice in cardiology, T. 116): That (based upon facts of record as posed in examining counsel's question, and based also upon the employee's autopsy report) it was the witness' opinion that the death of the employee "was not the result of any activity involved in this man's employment" (T. 118); that the reason therefor is that the autopsy report, (Deputy Commissioner's Exhibit No. 2, T. 155) shows the employee had generalized artiosclerosis with significant narrowing of the coronary arteries and "anything can cause a sudden demise under these circumstances"; that the death of such a person can happen in the course of lying in bed, relaxing, or sitting in a chair watching television "without necessarily having any exertion"; that "the absence of any specific stimulating or exertional episode makes me feel that the [fatal] attack was in no way related to [the employee's] employment" (T. 119); that in a patient with as much narrowing of the coronary blood vessels as the deceased employee, as documented by the autopsy report, the probability of sudden death is much greater than in a patient without such coronary artery disease, absent evidence of any physical or emotional stress situation (T. 121); that there was nothing in the history or the events of the morning in question that would make the witness believe that anything that happened to the employee that particular morning may have been a precipitating factor in his death (T. 121-122); that in one who has arteriosclerotic heart disease to such a marked degree as the employee there need be no precipitating factor; that, mechanically, such cases of arteriosclerosis come very close to closing a coronary artery, or possibly result in a clot or piece of the lining of the artery (plague) dropping off and (completely) blocking the passage (of blood) into the heart; that it cannot be determined from the autopsy report which of

these two causes resulted in the death of the employee, the report merely stating that death was caused by "Myocardial Insufficiency" and "Arteriosclerotic Heart Disease" (T. 122-123); that "the severity of arteriosclerosis doesn't always produce symptomatology"; that the heart muscle can, in such cases, fail and give out quickly in point of time (T. 124); that urination could (as claimant's own medical witness, Dr. James E. Chapman, had previously pointed out) "theoretically" produce stress or strain which might precipitate death (T. 125-127;[1] that death of the employee could have been due to "nothing", meaning to no activity; that the employee's coronary arteriosclerosis (and not any activity) "was the major reason for this man's having the attack" (T. 128); that it was this desease which must have precipitated anything that happened on the day of death (T. 129); that, with respect to physical stress situations, the belief of cardiologists is that a causal relationship of such stress and subsequent death within a short time "can only be related causally if there is some clinical symptomatology to suggest that the stress was doing something to the heart" (T. 130); that in the opinion of the witness the claimant "died at the time that he fell to the ground";[2] that, in a case such as the employee's, symptoms would have to intervene by manifestation before death in order for the witness to causally relate death to stress or physical exertion (T. 132).

EDWARD H. PIERCE, a witness called by the claimant, testified from the employee's employment records that the employee's time of arrival at work on February 12, 1964 was 8:48 a.m. (T. 48, 51-52).

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[1] Claimant had produced evidence indicating that the deceased employee, when he collapsed, was walking from between two parked vehicles in the yard where he had gone, for personal and non-work connected reasons, to answer a call of nature by voiding.

[2] The case contains conflicting as to the precise time of death, which conflict was never satisfactorily resolved. The hospital records and the autopsy report show 10:22 a.m. as the time (See T. 83; Deputy Commissioner's Exhibit No. 2, T. 155). But there was contrary evidence, including among others the testimony just noted, and that of Mr. Riegel, indicating that death had occurred earlier. See Joint Exhibit No. 1 at page 1, paragraph 2: "The time of the death was established to be between 9:30 a.m. and 9:40 a.m."

In an effort to convince the deputy commissioner that the employee's death was causally related to his employment, claimant introduced lay testimony of herself and of co-workers of the deceased, and medical testimony of Dr. Chapman, referred to herein before. However, none of the evidence of record of any witness, lay or medical, of either party indicated that claimant had actually started to work (other than to change clothes and take hand tools from a tool box) when he collapsed. If urination could be considered a cause of stress responsible for the attack, this was a personal matter having no relation whatsoever to the work activities he had been assigned. And analysis of the testimony of Dr. Chapman shows it to have but a simple theme, namely, that because death occurred on the employer's premises, death from causes unrelated to employment must, ipso facto, be ruled out of consideration, even though the day's assignment had not yet commenced. Obviously, workmen's compensation is not without relation to work. Entitlement is dependent not merely upon time and place alone ("course of employment", as that phrase is used in the compensation law) but, additionally, upon an injury "arising out of", i.e. caused by, such employment (as that quoted phrase is also used in the Act).

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANSON
Assistant United States Attorney

/s/ ELLEN LEE PARK
Assistant United States Attorney
Attorneys for Defendant Adler

[May 31, 1966]
[Certificate of Service]

[Filed June 22, 1966]

OPPOSITION TO DEFENDANT DEPUTY COMMISSIONER'S CROSS MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Mary R. Wheatley, through her counsel, and respectfully opposes defendant Deputy Commissioner's cross motion

for summary judgment for the following reasons:

1. The defendant's statement of facts, pursuant to Rule 9(b), is inconclusive as more fully set forth in the attached points and authorities which are made a part hereof by reference.

2. That the testimony submitted by defendant, Associated Transport, Inc., as set forth in the record, is not based on fact but merely on speculative conjecture, that, in law, must be considered subordinate to the presumption in favor of the validity of plaintiff's claim.

And for such other and further reasons that will be advanced at the hearing of this motion.

/s/ Karl G. Feissner

/s/ Daniel C. Smith
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[Certificate of Service]

[Filed June 22, 1966]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiff incorporates herein by reference her memorandum of points and authorities in support of her motion for summary judgment, and further adds:

I. PLAINTIFF'S COUNTER-STATEMENT PURSUANT TO RULE 9(h)

The plaintiff, Mary R. Wheatley, makes the following representations pursuant to Rule 9(h) of the local Civil Rules:

Plaintiff incorporates herein, her statement of the case and facts as to which there is no genuine issue, previously submitted and incorporated in plaintiff's motion for summary judgment.

With reference to the questions presented as set forth in plaintiff's motion for summary judgment, witnesses testified to the following facts, which support plaintiff's position that the decedent, Edward E. Wheatley's demise arose out of and in the course of his employment.

MARY R. WHEATLEY:

That she is the surviving widow of decedent (T.7-8), and that she had observed the decedent's condition, both prior to and on the morning of February 12, 1964, before decedent had left his home for work, and that at all times the decedent never complained of any physical ailment, nor did he complain of any "shortness of breath or pain in his arms" (T.12). On the morning of February 12, 1964, the decedent's condition was "the same as usual" (T.11).

EDWARD H. PIERCE:

Representing decedent's employer, Associated Transport, produced certain records with regard to decedent's employment, setting forth that decedent had been employed with defendant for 17 years (T.31) in the capacity of mechanic (T.32) and came to work at 8:48A.M. on February 12, 1964 (T.32). He further stated that decedent's absentee record "was nothing out of the ordinary." Mr. Pierce also stated, that according to the records the decedent's first job on the day of decedent's demise "was to repair a wheel bearing on a tractor" (T.39) and that the only way to remove the wheel bearing is to remove the wheel) (T.41). Also that the average wheel weighs approximately 90 lbs. (T.42). Also, a company (Associated Transport) report, states that "subject Wheatley proceeded to the tractor and was working on the tractor the last that Mr. Riegel saw of him, at 9:15. . . ." (T.50). Thus it would seem that the defendant's records reflect that decedent not only gathered his tools to commence work (T.50-51) but had started his assigned task.

ROBERT C. RIEGEL:

That he is and was employed by defendant, Associated Transport, Inc., on February 12, 1964, as shop foreman and decedent's immediate supervisor. (T.135) That he assigned the decedent the job of removing a tractor wheel and retreading the axle (T.136) and that decedent had changed his clothes and commenced the required assignment at or about 9:15 A.M. (T.137). Also that decedent, in preparing for the job, had carried his tools to the job location (T.141), however, no one, including Mr. Riegel could say that they had observed the decedent actually doing physical work on the tractor, (T.139) which in itself is speculative because no one had actually taken notice, including Mr. Riegel, who was on a conference telephone at the time (T.137, 143). It would necessarily follow that the decedent, who was the best man for the particular assigned job (T.141), somewhat crippled and meticulous in his work (T.142) had actually commenced the job when he got his tools and laid them out at the tractor wheel, and, in essence, commenced work. (T.143, 145, 149). Mr. Riegel could not ascertain the amount of work done or "what tools were there" although he does state that "there were some" tools present (T. 146). The witness did state that even though the acetylene torch, required for the job, was not at the job location, decedent "had moved the torch" (T.147).

The company, through Mr. Riegel, considered the job as started which is evidenced by their 501 Mechanic's Time Distribution Form which accounts for all labor expended on each vehicle (T.149-150). This would seem consistent with any job, in that part of a job, especially one of the nature described above, would require carrying heavy tools and moving a torch to the job location, surveying the situation and commencing the task. This is part of the decedent's job and a part that was actually performed by the decedent, and, from Mr. Riegel's and the company's standpoint, they considered it to be "working on the tractor" or job. (T.149).

JAMES E. CHAPMAN, M.D.:

(An expert in internal medicine and cardiology T.63-64) That based on examination of the decedent's autopsy record and microscopic slides (T.65), statements from plaintiff and decedent's co-workers, the sudden demise of the decedent was the result of activity performed during decedent's employment (T.94-95,97) This was based on a detailed study of the microscopic slides of decedent's heart tissue changes which indicate that the fatal attack began somewhere between one minute (T.97,98) and one hour from the time fo death (T. 82,84,98), even though there is some conflict as to the exact time of death (T. 83, 108) (Also admitted by defendant on Page 4, footnote 2, of defendant's statement pursuant to Rule 9(h))"Having established that he couldn't have had an attack beginning more than 45 minutes prior to his death, we have to take the opinion that something happened between 45 minutes before the end of his life, or one hour before the end of his life, and the end of his life which initiated or precipitated a heart seizure" (T.92). Even though the decedent had a prior existing or latent myocardial insufficiency (T.86), this condition "is not necessarily a fatal condition" (T.93), but requires something more (T.100,103). This would include "straining" (T.101), lifting or "moving a heavy object" (T.85). And if "we assume that" the decedent was a "prudent individual, who if he had been feeling ill or in any way uncomfortable, he would have mentioned it to his foreman (T.104) at the 9:15 discussion they had concerning the pending job, "then something must have happened" (T.104) after the decedent commenced his work activity. Therefore, "it was a reasonable probability that this attack began after the 9:15 conference (T.113-114). This reasonable probability is not refuted by Dr. Thomas' testimony.

LAWRENCE J. THOMAS, M.D.:

(An expert qualified in internal medicine, T. 116) This witness was called on behalf of the defendant Associated Transport, Inc. (T.114) and testified that decedent's demise "was not the result of any acitivity involved in this man's [decedent's] employment". (T.118) However, the only history

known to the doctor was through the autopsy report (T.133). He did not "see the slides" taken by the Coroner (T.133), even though they could have been made available.

The testimony of Dr. Thomas is not in conflict with that of Dr. Chapman, however, both doctors arrive at different results. If we look at the medical history and information gathered and examined by Dr. Chapman, we find that Dr. Chapman's views are completely supported, wherein, Dr. Thomas finds contrary even though he is in agreement with Dr. Chapman and has read only the autopsy report. Also, Dr. Thomas adds on additional factor, namely cold weather, by stating, ". . . coronary artery disease is affected adversely by cold, it produces constriction of blood vessels and it may increase the tendency or the propensity towards heart attacks or sudden death. .". (T.119) In further support of Dr. Chapman, the witness goes on to state that, "If there is a proven situation where there has been some unusual stress or strain, this could conceivably help to provoke a heart attack which would result in death". (T.121) In the instant case there is a proven situation where the decedent had commenced work, in 40 degree weather. (Testimony of Riegel, supra). Again at page 124 of his testimony, the witness states, ". . . unfortunately, you can have severe arteriosclerosis and you can carry on normal activities until something gives way". (T.124) But the witness could not pin down a precipitating factor that could have caused death, and, again, agreed with Dr. Chapman's diagnosis (T.125-126).

At the conclusion of the witnesses testimony, the doctor was asked by

> THE DEPUTY COMMISSIONER: Now many hypothetical questions may have been asked you and illustrations about what may have happened.
>
> But I gather from your testimony that whatever was asked of you, you were not able to specifically say that some certain specific thing that was mentioned was the probable precipitating factor.

THE WITNESS: Nothing except the presence of coronary arteriosclerosis.

Thus, the witnesses testimony, was a mere affirmation of Dr. Chapman's testimony and a reiteration of the autopsy report, and he did not refute the plaintiff's case nor shed any light on the Deputy Commissioner's finding of fact. The witness was doing nothing more than rendering his employer, Associated Transport, Inc. a beneficial opinion that would air their cause.

II.

CONCLUSION

If we view this case in the proper perspective, we can see that the plaintiff established her case, through medical testimony, and others, as set forth above, that the demise of decedent arose out of and in the course of his employment and causally related thereto. We cannot lose sight of the fact that, under the statute, the claim is presumed to be valid and that any doubts should be resolved in favor of the employee (decedent) or his dependent family. This principle applies to both issues of law and fact. Hancock v. Einbinder, 114 U.S. App. D.C. 67 310 F.2d 872 (1962); Friend v. Britton, 95 U.S. App. D.C. 139, 220 F.2d 820 (1955). It is respectfully contended that the defendants have not, in any manner, refuted the plaintiff's claim, either in law or fact, or through medical testimony. Thus, the presumption in favor of a valid claim has not been overborn by defendants.

The plaintiff's claim is not based, as defendant would like this court to believe, on "the mere fact that death occurred during working hours", by on expert medical testimony, as set forth above and in the transcript (T.62-114), which has not been refuted by medical testimony offered on behalf of defendant, Associated Transport, Inc. (T.114-133), and also on co-workers testimony and company reports, the prevailing weather

conditions, and the physical condition of decedent both before and after he commecned work on February 12, 1964. With all the unrefuted facts coupled with the presumption that the claim is valid, it is respectfully contended that the Deputy Commissioner's finding of fact was unsupported by the evidence and contrary to law.

After all, one might say that cold weather alone could be a precipitating factor causing death, as heat from the sun did in Davidson v. Cardillo, 143 F.2d 154 (D.C. Cir.1944), because by the very nature of the employment in both cases, the employee is exposed to the risk. However, the plaintiff has submitted much more evidence than mere weather conditions or presence at work.

In light of the aforementioned and plaintiff's memorandum of points and authorities in support of her motion for summary judgment, it is respectfully contended that the findings of the Deputy Commissioner are inconsistent with the evidence and spirit and benevolence of the Act and contrary to settled principles of law applicable to cases of this nature and therefore the findings of the defendant, Deputy Commissioner should be reversed and remanded back to said defendant to enter an award for the plaintiff.

Respectfully submitted,

/s/ Karl G. Feissner
Attorney for Plaintiff

/s/ Daniel C. Smith
Attorney for plaintiff

Of counsel:

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TRANSCRIPT OF PROCEEDINGS

Washington, D. C.
August 31, 1965

4 THE DEPUTY COMMISSIONER: This hearing is being held upon the application of Mrs. Mary R. Wheatley, 12106 Wheatley Lane, Beltsville, Maryland.

From the informal information in the Bureau's administrative file it appears that on November 13, 1964, Mrs. Wheatley filed claim against the Associated Transport, Inc., 1936 Montana Avenue, Northeast, Washington, D. C., for death benefits under the District of Columbia Workmen's Compensation Act, alleging that on February 12th, 1964, her husband, Edward E. Wheatley, while on duty and on the premises for the said corporation as a mechanic at an average weekly wage in excess of $105, suffered death attributable to myocardial insufficiency due to arteriosclerotic heart disease, and alleging further that such death was related to his employment.

Mrs. Wheatley, who was born on December 1st, 1904, was married to the deceased employee on June 23rd, 1962, and is the surviving widow of the decedent.

It also appears that written notice of the death was not given to the employer within 30 days but that the employer had knowledge of the death of the employee and has not been prejudiced by the lack of such written notice.

Funeral services were rendered on behalf of the deceased employee
5 by Dewitt Donaldson, undertaker, 313 Talbott Avenue, Laurel, Maryland, the reasonable expense of which amounted to $960.20.

The said funeral expenses were paid in full by Rosa Wheatley, 12106 Wheatley Lane, Beltsville, Maryland.

In this proceeding the claimant will be represented by Attorney Karl G. Feissner, and the employer will be represented by Attorney Joseph S. McCarthy.

Before I ask you, Mr. Feissner, to give me the items of claim to be made in this hearing, I want first to put into the record the claim filed by the claimant as The Deputy Commissioner's Exhibit Number One.

(The document referred to was marked Deputy Commissioner's Exhibit No. 1 for identification and received into evidence.)

A coroner's autopsy report under the seal of the Coroner's Office for the District of Columbia, as the Deputy Commissioner's Exhibit Number Two.

(The document referred to was marked Deputy Commissioner's Exhibit No. 2 for identification and received into evidence.)

And a certificate of death from the District of Columbia Department of Public Health issued December 10th, 1964, as The Deputy Commissioner's Exhibit Number Three.

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(The document referred to was marked Deputy Commissioner's Exhibit No. 3 for identification and received into evidence.)

Mr. Feissner, will you state the claim.

MR. FEISSNER: Yes, sir. The claim is for the widow's allowance under the Longshoremen and Harbor Workers' Act, I believe of $70 a week to the widow, and funeral expenses. There are no children.

THE DEPUTY COMMISSIONER: Under the Longshoremen and Harbor Workers' Act as extended to the District of Columbia?

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISSIONER: And you are claiming benefits, compensation benefits for the widow and funeral expenses?

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISSIONER: Let me ask you this, —

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISSIONER: — Mr. Feissner. As you may have noted, in my opening recitation I stated that the expenses of the funeral were paid by Rosa Wheatley. Is Rosa Wheatley the same as this claimant?

MR. FEISSNER: Yes, sir.

7 THE DEPUTY COMMISSIONER: Rosa Wheatley is the same person as the claimant in this case?

MR. FEISSNER: Yes, sir. Her name is Mary Rosella.

THE DEPUTY COMMISSIONER: All right.

MR. FEISSNER: Mr. Commissioner, if I may, sir, if I may — You didn't attach as an exhibit the marriage license. I have another copy if you would like it, here.

THE DEPUTY COMMISSIONER: We won't go into that as yet. I have indicated in the opening recitation that that is what the administrative file shows, and if there is no issue raised as to dependency it will be assumed that the employer concedes that the claimant is the surviving widow.

MR FEISSNER: All right.

THE DEPUTY COMMISSIONER: The employer, who has qualified as a self-insurer, has controverted the claim. Mr. McCarthy, what are the grounds of controversy?

MR. McCARTHY: That there was no accident, that there was no accident, that his death did not arise out of or in the course of his employment. That it was merely coincidence that he happened to be working at the time he sustained this coronary, that he had a long-standing arterio-

8 sclerotic heart condition which culminated in this clot.

THE DEPUTY COMMISSIONER: All right. Is there any question as to the status of the claimant, that is, status as the surviving widow?

MR. McCARTHY: No.

THE DEPUTY COMMISSIONER: Mr. Feissner is anxious to put in

a marriage certificate. There is no issue as far as that is concerned. The employer concedes that the claimant is the surviving widow, so we will have no need for the filing of the marriage certificate.

Then do we understand that the issue to be tried at this hearing is whether the deceased employee sustained an injury and death arising out of and in the course of the employment within the meaning of the Compensation Act? That seems to be the only issue. Is that correct, Mr. Feissner?

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISSIONER: Do you understand that to be the only issue?

MR. FEISSNER: Yes, I do.

THE DEPUTY COMMISSIONER: Mr. McCarthy?

MR. McCARTHY: Yes. As I understand the issue, as you have stated it, it is whether the claimant sustained an injury and death arising out of or in the course of the employment.

THE DEPUTY COMMISSIONER: That is correct.

MR. McCARTHY: Fine.

THE DEPUTY COMMISSIONER: All right. Mr. Feissner, before this hearing opened, I believe you spoke about wanting to file certain exhibits. Is that correct? Or do you wish to withhold that, any offer of —

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISSIONER: — exhibits until subsequently?

MR. FEISSNER: Yes.

THE DEPUTY COMMISSIONER: All right. Mr. Feissner, —

MR. FEISSNER: Yes, sir?

THE DEPUTY COMMISSIONER: — I believe you can proceed with your first witness.

MR. FEISSNER: Mrs. Wheatley.

10 Whereupon,

MARY ROSELLA WHEATLEY

the Claimant, was called as a witness in her own behalf and, having first been duly sworn by the Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your full name and your full address.

THE WITNESS: Mary R. Wheatley — Mary Rosella Wheatley, 12106 Wheatley Lane, Beltsville, Maryland.

THE DEPUTY COMMISSIONER: All right, Mr. Feissner.

DIRECT EXAMINATION

BY MR. FEISSNER:

Q. Mrs. Wheatley, as you know, we are here discussing the question of your husband's death in February of 1964. Now, my question to you is this: Based upon your living together and being with your husband, can you tell us briefly what his medical condition was prior to February '64, basing it upon whether there were any complaints to you, or how often he went to the doctor, or such as that. A. No, there was no complaints and he did not go to the doctor. He stayed home in December about a week with a cold. He was a man, I think if he was sick, he would have stayed home.

11 Q. Prior to the — Let's take, for example, the day of his —

THE DEPUTY COMMISSIONER: Excuse me for a moment, Mr. Feissner. Dr. Rayford, whom I believe you subpoenaed, has appeared. Let's get off the record for a moment.

(Discussion off the record.)

Back on the record.

Go ahead. Proceed.

MR. FEISSNER:

Q. Do you recall the day of your husband's death? A. Yes, I certainly do.

Q. Were you with him that morning? A. I most certainly was.

Q. All right. What was his condition when he went to work? A. The same as ever. The same as usual.

Q. What was that, ma'am? We weren't there. A. Well, I mean he was well.

Q. All right. A. He got up and dressed the same as —

THE DEPUTY COMMISSIONER: Rather than ask her the condition,
12 let's see if she observed anything which was unusual about the man. I think you're making the question a little too technical for the claimant.

MR. FEISSNER: All right, sir.

MR. FEISSNER:

Q. Did you see anything unusual about your husband? A. No.

Q. And prior to his death had he ever, in your presence, complained of shortness of breath or pain in his arms? A. Never.

Q. Acute indigestion? A. Never.

Q. Other than the incident with a cold in December had he had any illness for which he had received medical treatment? A. No.

MR. FEISSNER: That's all I have, sir.

THE DEPUTY COMMISSIONER: Mr. McCarthy.

CROSS EXAMINATION

BY MR. McCARTHY:

Q. I understand you were married to Mr. Wheatley in 1962. A. Yes.

13 Q. July of '62? A. No, June.

Q. June of '62? A. I knew him long before that though.

Q. I see. I take it from what you said he had never had a heart problem that you knew about prior to February of 1964, prior to the day of his death. A. No. No, he didn't.

Q. And as far as you know had never been treated for it. A. No. He said the only time he went to a doctor was when he had lumbago in his back, and that was when he lived in Washington and was off of work six weeks at that time.

Q. Does he have any brothers or sisters surviving him? A. No.

Q. Did he have any brothers or sisters who predeceased him? A. They all died before he did.

Q. Did any of them die of heart disease? A. No.

Q. Are you sure of that? A. Not as I know of. I know his brother died in December sixty — Wait a minute, I can't think of the date. It was
14 about a year or two before Ed did. But it was from a burn. See?

Q. I see. Now, tell me, was he an active man, Mrs. Wheatley? A. Very active.

Q. Well, what — A. Not at home, I mean. He didn't have anything to do at home.

Q. Did he garden? A. Oh, in the summer, yes. The summer before his death.

Q. Did he do any building at home? A. No. He had the house built himself. I mean by a contractor.

Q. I see. Did he — A. He did no strenuous work at home.

Q. Did he do anything with cinder block there at home, mixing cement at all? A. No. He hadn't bothered with that for a long time.

Q. For how long? A. Oh, long before I married him, I guess. No, his strenuous wor k was on the job. That's all. Cold weather and

15 strenuous work. And I just think that's what did it.

I asked him where he was working and he told me it was up in the mountains of Virginia, I don't know whether it was the Monday before he died or the week before, because his face was kind of pink when he come home and I asked him what — you know, and he said oh, it was the cold weather, I've been up in the mountains working on a trailer truck today.

Q. How long had he been with — Well, you don't know that. A. 14 or 16 years, I think. With the Associated Transport, you mean?

Q. Had he had any injuries on the job since you knew him? A. No. No, he told me all about himself. He said he never had no injury or anything.

Q. As I understand your testimony, he did not mix any concrete and make any cinder blocks. A. Not at home. Not since I knew him or been married to him.

Q. Did he care for his own lawn, do his own landscaping? A. No.

Q. He did not? A. No. Santino did it. Joe Santino.

16 Q. I see. A. I know my neighbor come up there after he died and looked at his tools and he said I'm a mechanic but, he said, I couldn't use some of those tools. And he said, you know, Mrs. Wheatley, that's about the hardest mechanic work there is, that Associated Transport, working on those tractor trailers. He said this after he was dead. He said no wonder he dropped dead with a heart attack.

Q. This man worked for Associated Transport? A. No. This man is a mechanic in Beltsville. He runs his own office and everything.

Q. I see.

MR. McCARTHY: I've nothing further.

THE DEPUTY COMMISSIONER: Mrs. Wheatley, apparently you were married for about a year and a half.

THE WITNESS: A year and eight months.

THE DEPUTY COMMISSIONER: A year and eight months?

THE WITNESS: But I knew him over two years.

THE DEPUTY COMMISSIONER: Before his death.

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: And, of course, as your counsel
17 brought out from questioning you, on the morning of his death he appeared normal to you as usual and you also stated in answer to a question by your attorney that you never observed him to be out of breath or to complain of any chest pain.

THE WITNESS: No.

THE DEPUTY COMMISSIONER: Or give any symptoms that would suggest that he had any kind of a heart ailment.

THE WITNESS: (Shaking head.)

THE DEPUTY COMMISSIONER: And that's the way you found him.

THE WITNESS: (Nodding head.)

THE DEPUTY COMMISSIONER: So when he came home following a day's work you apparently found him in the same usual condition.

THE WITNESS: He eat good and drove his car. Sometimes he come all the way around by the Tick Tock, which was out of the way.

THE DEPUTY COMMISSIONER: This was after he returned from work.

THE WITNESS: Yes. It was a shock to me when -- I thought when the police come in the yard that he had been killed in an accident because it was just such a shock.

THE DEPUTY COMMISSIONER: In other words, the thought of your husband dying of a heart condition was very far removed?

18 THE WITNESS: Yeah. I can't beleive — I don't believe yet he had it.

THE DEPUTY COMMISSIONER: Mrs. Wheatley, I have a statement which covers your — funeral expenses of your husband, and it states that it was paid by one Rosa Wheatley. Are you also —

THE WITNESS: Yes. Mary Rosella. They call me Rosa for short. You can put my name down right, though. It's Mary R. Wheatley. Mary Rosella.

THE DEPUTY COMMISSIONER: All right. If there are no further questions —

THE WITNESS: They have my birth certificate with my name.

THE DEPUTY COMMISSIONER: If there are no further questions of this witness — Mr. Feissner?

MR. FEISSNER: No, sir.

THE DEPUTY COMMISSIONER: Mr. McCarthy?

MR. McCARTHY: No.

THE DEPUTY COMMISSIONER: Then you may be excused. Thank you very much for your testimony. You may return to the seat next to your attorney.

19 (Witness excused)

Your next witness, Mr. Feissner.

MR. FEISSNER: Mr. Corder.

Whereupon,

CALVIN LEE CORDER

was called as a witness by and on behalf of the Claimant and, having first been duly sworn by the Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your full name —

THE WITNESS: Calvin Lee Corder.

THE DEPUTY COMMISSIONER: — and your full address.

THE WITNESS: 1204 North Sycamore Street, Alton, Virginia.

THE DEPUTY COMMISSIONER: All right, Mr. Feissner.

DIRECT EXAMINATION

BY MR. FEISSNER:

Q. Mr. Corder, we are going to ask you a few questions, and Mr. McCarthy will ask you a few and perhaps the Commissioner. It's somewhat informal. Please feel at ease. If you want to stop to go —

THE DEPUTY COMMISSIONER: It is not somewhat informal. This is a formal hearing. But you can be at ease.

BY MR. FEISSNER:

Q. Be at ease is what I'm trying to say. Where are you employed, sir? A. Associated Transport.

Q. And what is your function there? A. Truck driver.

Q. How long have you been so employed, sir? A. Five and a half years, sir.

Q. When you say truck driver, is this what a layman would call semi's? A. Straight job, sir.

Q. Would you tell the Commissioner what a straight job is. A. Well, it's a truck about 18 feet long, the bed is. It's about the size of a two and a half ton truck.

Q. Now, perhaps you know we are making an inquiry around the death of Edward Wheatley which occurred in February of '64. Were you present at that time? A. I was in the back yard.

Q. Where — what is the relation of the back yard to where the death occurred? A. It's about roughly 50 to 75 feet away.

21 Q. Can you tell us what you observed and saw at that time? A. When I was there I was going down to get my truck. I heard a commotion up there and noise started going around and they was hollering, so I walked on up there.

Q. What did you see? A. I seen Edward laying on the ground. I looked at him and I stayed maybe a minute at the most and went on back to my truck and left.

Q. What was the weather that day? A. A little cold.

Q. When you say a little cold, could you be — could you help us a little more specifically, sir? A. I wouldn't want to say because back then I don't remember, but I know it was in the wintertime.

THE DEPUTY COMMISSIONER: Was it a usual winter day?

THE WITNESS: About a usual winter day.

THE DEPUTY COMMISSIONER: Was it extremely cold? A. No, sir. THE DEPUTY COMMISSIONER: Was it a little too cold for a winter — the average winter day?

THE WITNESS: No, sir.

BY MR. FEISSNER:

22 Q. Now, were you familiar with Ed Wheatley? A. Yes, sir.

Q. Would you first of all describe to the Deputy Commissioner the area in which Mr. Wheatley worked, the physical area.

MR. McCARTHY: Wait a minute. Are you speaking about the time his death occurred?

MR. FEISSNER: Within the week preceding. His general place of employment.

MR. McCARTHY: If you know.

THE WITNESS: Well now, I didn't see Ed Wheatley that morning before this.

BY MR. FEISSNER:

Q. I understand. A. But prior, two weeks before, or days before, I had seen him in the shop, something like that.

THE DEPUTY COMMISSIONER: You are a truck driver?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: And you are out on the road?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: But would you still have a very good idea of where Mr. Wheatley worked when he was on duty?

23 THE WITNESS: Well, I would say he was in the shop there. He was — My qualifications for the man, he was a light duty man.

THE DEPUTY COMMISSIONER: Do you want him to describe the area of the shop?

MR. FEISSNER: Yes, sir, that's what I was referring to.

BY MR. FEISSNER:

Q. You pick up your truck there almost every day, don't you? A. The truck is not in the shop. The shop joins on to the building.

Q. But they are within 50-75 feet? A. Yes, sir. Yes, sir.

Q. All right. A. We pass the shop every morning.

Q. Where is the area where the mechanics are? A. Well, you come down the back steps and the shop is right on the left of it. We go past the shop and you go back till you get your truck. You will see the shop men then.

Q. What type of area do they work in? Is it bays like a gas station? A. I'd say it's like a garage. 25-30 feet long. It's about ten-15 feet wide.
24 It's about 15 feet wide.

Q. Let me ask this question now. Tires on your truck. What size are they? A. 720's, I guess. They're 20-inch.

Q. What is their weight? Do you know? A. 100 pounds, 120 pounds. Around 100 pounds.

Q. All right. A. Ed Wheatley did not change a tire.

Q. On your truck? A. No truck.

Q. I understood you to say you were out on the road. A. Yes, sir.

Q. Have you discussed your being here this morning with Mr. Riegel? A. No, sir, I have not.

Q. To your knowledge he never changed a tire? A. Yes, sir. He has never changed a tire to my knowledge. I will say that, to my knowledge.

Q. What work did he do to your knowledge? A. Ed Wheatley was qualified as a light duty man. If you had light problems, the truck wouldn't start or something like that. But Ed Wheatley, as long as I knew Mr. Wheatley, he would never change a tire. Pull a truck —

25 Q. What is pull a truck? A. You know, get them started. Change a battery. He might do that if they needed help.

Q. What was his job as far as you — A. I'd say electrician.

Q. He was an electrician? A. A fuse man. Turn signals. Installing light stuff.

Q. How many trucks did they have at that shop? A. 40. I'd say 35-40.

Q. Is there just one bay where the men work on the trucks? A. Yes, sir.

Q. About 25 feet high? A. Roughly.

Q. Is there an overhead door to it? A. Yes, sir.

Q. How is the bay heated? A. Gas and electric. It was gas.

Q. With an overhead register? A. Yes, sir.

Q. Now, this man wasn't a general mechanic. Is that right?

26 A. No, sir. I wouldn't say so.

Q. He didn't tune up or grease or change oil or things like that? A. Not to my knowledge.

Q. How often did you see him at his job? A. Oh, I'd say three, four days a week.

Q. A whole day? A. (Shaking head.) Three minutes, and that would be it. Walk past him, I'd speak to him.

Q. Oh. A. I might just pass him.

Q. In other words, you would see him — Would it be fair to say you would see him no more than 30 minutes out of a week at his job? A. I — 30 minutes would be the most in a whole week.

Q. All right. Now, at the time that Mr. Wheatley collapsed did you physically see him collapse? A. No, sir. I was —

Q. You were about 25 feet away and saw — A. I come up when I heard a commotion.

Q. But you didn't see him fall? A. No, sir.

27 Q. Do you know where he came from? A. I know where he was laying.

Q. Where was he laying? A. What do you mean, where did he come from?

Q. Where had he — Where was he laying? A. By the shop.

Q. Inside or outside? A. Outside.

Q. What time was this? A. I don't know, I'd say around nine o'clock.

Q. Nine o'clock in the morning? A. Eight-thirty to nine.

I clock in at eight-thrity. That's when I punch on.

Q. When did Mr. Wheatley punch on? Do you know. A. Well, they have different shifts back there. I don't know when he punches on. Around — I guess it would be the shift the same as we go on, maybe after.

Q. Eight o'clock?

MR. McCARTHY: He said maybe after.

MR. FEISSNER: Oh, after.

MR. McCARTHY: At the same time, maybe after.

THE WITNESS: They'd have to have a shift — When we go on, they'd have to have a new shift coming in then.

28 BY MR. FEISSNER:

Q. What time was that? A. That's eight-thirty. So he'd have to get there at eight-eight-thirty.

Q. They start up the trucks for you? A. Yes, sir.

Q. Did he start up a truck? A. No, sir.

Q. And this happened at nine o'clock? A. I'm not telling you the time. I'm just giving you a rough estimate. Around eight-thirty to nine o'clock.

Q. All right. Was he inside or outside the shop? A. Outside.

Q. How far outside? A. Oh, 20-30 feet.

MR. FEISSNER: That's all I have.

THE DEPUTY COMMISSIONER: Mr. McCarthy.

CROSS EXAMINATION

BY MR. McCARTHY:

Q. There was no vehicle that he was working on at the time he fell? A. Not to my knowledge.

Q. Had he ever restricted himself, to your own personal knowledge?
29 Did he ever do any heavy work on your truck? By that I mean changing tires and what you would consider heavy work. A. No, sir.

Q. Did you ever see him — And I understand that you saw him for only a few minutes each day. Did you ever see him doing any heavy work, that is changing tires or things of that nature on any equipment over there? A. No, sir, not to my knowledge. I haven't.

Q. And you characterized him as far as what you saw him do as a a light duty man? A. Yes, sir.

Q. Did he show any signs of having any injury to his body at the time you went to his side and saw him? Did he show any bruises — A. (Shaking head)

Q. — is what I'm getting at. A. No, sir.

Q. Did you ever hear that he had been injured and that caused him to fall? A. No, sir. Mr. Wheatley wouldn't talk about nothing. He was a very quiet fellow.

30 MR. McCARTHY: I don't think I have anything else.

THE DEPUTY COMMISSIONER: No further questions? All right, thank you very much for your testimony. You may be excused now.

(Witness excused.)

Let's go off the record for a moment.

(Discussion off the record.)

Back on the record.

Mr. Feissner, any further witnesses?

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISIONER: All right. Is this your witness, this gentleman here?

MR. FEISSNER: Yes, sir.

Whereupon,

EDWARD H. PIERCE

was called as a witness by and on behalf of the Claimant and, having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your full name and your full address.

THE WITNESS: Edward H. Pierce. 302 Edward Avenue, Linthicum, Maryland.

THE DEPUTY COMMISIONER: All right, Mr. Feissner.

31 DIRECT EXAMINATION

BY MR. FEISSNER:

Q. Where are you employed, sir? A. Associated Transport.

Q. How long have you been so employed? A. 11 years.

Q. And you have been seated here this morning with counsel as a representative of the employer? A. Yes, sir.

Q. You have with you the employment records of Mr. Wheatley, is that correct? A. Yes, sir.

Q. May I have them, please? A. (Handing documents to Mr. Feissner.)

Q. Take out any letters of counsel that might be in there. A. (Removing papers from file.)

Q. I assume, sir, that the papers that you are removing are matters, correspondence between you and your counsel which contain no facts relating to this case. A. No, sir.

Q. All right. How long had Mr. Wheatley been employed with your company, sir? A. I think it was 17 years, I believe. He was employed

32 in 1947.

Q. To your knowledge what was the work that Mr. Wheatley did? A. He was a mechanic.

Q. What is the function of a mechanic, sir? — First of all, was he paid the same rate of pay as other — the other mechanics? A. Yes, sir.

Q. Okay. What are the functions of a mechanic down there? A. Well, they are many and varied. To repair trucks would be the essential thing.

Q. And he drew the same pay as everybody else? A. Yes, sir.

Q. When did he come to work on this particular day? Do you know, sir? A. Yes. This is the one here (indicating document). He came to work at 8:48 a.m.

Q. Was a report made to your office as to what the cause of death was, or rather what the time of death was, by your Mr. Riegel? A. Well, —

Q. Mr. Riegel is a supervisor, isn't he? A. Yes. He's the shop foreman.

33 Q. And he was on the scene, wasn't he? A. He was there.

Q. Did he make a report to you all of what happened? A. Well, there was a report made by Mr. Webster, who is employed by Associated, concerning the incident itself.

Q. Is that in here? A. No. I don't have a copy of that.

Q. I'd like to have it, if I may. A. I think Mr. McCarthy has it.

MR. McCARTHY: What is it you want? A report?

THE DEPUTY COMMISSIONER: Will Mr. Riegel be here to testify?

THE WITNESS: Yes, sir, Mr. Riegel will be here.

MR. FEISSNER: I don't want to call Mr. Reigel. I just want a —

THE DEPUTY COMMISSIONER: Well, Mr. McCarthy may want to call him.

MR FEISSNER: Oh, yes, sir. Oh, very definitely. I'm looking for the report that Mr. Webster made to the employer.

THE DEPUTY COMMISSIONER: Is there such a report available in your file?

THE WITNESS: I don't have it in my file.

It's an activity report of his he makes pertaining to his job, which is

34 a different department.

He makes one every day regardless of the circumstances. Just an activity report.

THE DEPUTY COMMISSIONER: Am I to understand --

THE WITNESS: Which he files to his superior.

THE DEPUTY COMMISSIONER: Am I to understand that this report we're talking about would be an all-inclusive report? Is that it? Of the activities --

THE WITNESS: Of his acitivities for the day, yes, sir.

THE DEPUTY COMMISSIONER: For the entire day, which would cover not only Mr. Wheatley, but other employees?

THE WITNESS: This is any incident, yes, sir.

THE DEPUTY COMMISSIONER: All right.

BY MR. FEISSNER:

Q. And where is that report right now? A. He submits this to his --

Q. But didn't you just say Mr. McCarthy has it, sir? A. He had a --

MR. McCARTHY: I don't know whether I have it or not.

THE WITNESS: -- a letter from Mr. Grossman, I think, —

BY MR. FEISSNER:

Q. Where is the report?

35 A. (Continuing) --clarifying--

THE DEPUTY COMMISSIONER: Just a minute.

Mr. McCarthy, do you have such a report?

MR. McCARTHY: I might. I'll look.

THE DEPUTY COMMISSIONER: All right.

Let's go off the record.

(Discussion off the record.)

Let's go back on the record.

The record can show that Mr. McCarthy has just handed Mr. Feissner the subject report.

MR. FEISSNER: I would like to offer this into evidence as the employer's report, kept in the ordinary course of business, of what transpired, and make it the Claimant's exhibit. And I would like to have it back to continue my examination.

THE DEPUTY COMMISSIONER: Any objection, Mr. McCarthy?

MR. McCARTHY: I don't think I have any objection.

I'd like to look it over. I haven't read it over in a week or so. I don't know what's in there.

Obviously it pertains to other things that wouldn't come in in this hearing.

I don't know what else is in there.

THE DEPUTY COMMISSIONER: All right, we'll give you a couple
36 of moments to take a glance at it and see whether you have any objections to the filing of the report.

(Mr. McCarthy examining document.)

MR. McCARTHY: I have no objection to this.

THE DEPUTY COMMISSIONER: All right.

Let's go off the record for a moment.

(Discussion off the record.)

Back on the record.

As the result of an off-the-record discussion, counsel for both parties stipulate to the admission into the record of the Internal Security Division, Associated Transport, Inc. Report, which apparently is kept in the regular course of business of the employer, covering the acitivities of the employer on February 17, 1964.

It consists of three pages and apparently was executed by a Cecil Webster.

The said report will come into the record as Joint Exhibit Number One by reference.

(The document referred to was marked Joint Exhibit No. 1 by reference for identification and received into evidence)

BY MR. FEISSNER:

Q. Mr. Pierce, just this. I didn't notice it in any records that are here, and my question is whether you have any records at all or to your own personal knowledge is there -- do you have any indication of Mr.

37 Wheatley ever being ill on his job before, suffering such symptoms as an ache in the arm or shortness of breath or acute indigestion?

A. Not to my knowledge.

Q. In your employment, sir, do the men take a physical when they come to work? A. When they are first employed, yes.

Q. In his case that would be almost 14 years ago. '47 I think he was hired. A. Right.

Q. Right? A. Yes.

Q. Other than that there would be no -- A. Not for a mechanic no.

Q. Not for a mechanic? A. I don't believe so.

Now, the ICC requires drivers to have physicals every two years.

Whether this applies to a mechanic that drives or not, I'd have to check really to be truthful with you.

Q. You don't know? A. I don't know at this moment, no.

Q. Okay.

Then, insofar as you are concerned, as far as the records of Associ-

38 ated Transport are concerned, did this man have any history of absence from his employment because of illness? A. No. No history as such, as far as I know.

Q. Well, let me close it with this.

In your own words, sir, what was his work record, over his 14 years what was his work record insofar as his being present was concerned?

A. In the period that I knew him --

Q. That would be 11 years? A. Well, no. Six years I worked in the --

38 THE DEPUTY COMMISSIONER: Are you interested, Mr. Feissner, in his work record or his absentee record?

MR. FEISSNER: Work record as it pertains to his being present, sir.

THE DEPUTY COMMISSIONER: What you want to know is his absentee record, in other words.

MR. FEISSNER: Very well. Perhaps that's a better choice of words.

THE DEPUTY COMMISSIONER: I think that may be closer to it.

THE WITNESS: It was nothing out of the ordinary, or I would have paid some attention to it.

THE DEPUTY COMMISSIONER: In other words, there was nothing about his absentee record which would draw attention to --

39 THE WITNESS: No, sir.

THE DEPUTY COMMISSIONER: -- to you or to the management or whoever would be authorized to handle such a thing.

THE WITNESS: No.

THE DEPUTY COMMISSIONER: All right.

BY MR. FEISSNER:

Q. Perhaps, sir, you can help us in this area.

I assume you are fairly familiar with the operation of trucks, --

A. Yes.

Q. -- and such as that. A. Yes.

Q. I note the report here, on page two that it states that Mr. Wheatley -- that Mr. Riegel, the shop foreman, was speaking with Mr. Wheatley at about nine-fifteen a.m. regarding his work assignments and that his first assignment was to repair a wheel bearing on a tractor that was inside the shop.

Now, when they say a tractor, sir, is that a word of art that you are referring to the engine or the thing that pulls the trailer? A. Yes. It's the --

Q. It's a semi --

40 A. Right.

Q. -- with two pieces on it. A. Yes.

Q. Okay.

And the tractor is the thing up front with the engine on it?

A. Right. Yes, sir.

Q. And the trailer is the thing you hook back and tow around.

A. Yes, sir.

Q. Have you been a driver, sir? A. No, sir.

Q. You haven't? A. No.

Q. But you are pretty familiar with things over there? A. Yes.

Q. Okay. I'm not. That's why I'm treading just a little gently.

As I understand it, if a chap is going to repair a wheel bearing, -- I assume that would be like on an automobile, a front wheel bearing on a car.

Is that right? A. Similar.

Q. In other words, it's the round thing that goes over the axle.

41 A. Right.

Q. And in order to repair this wheel bearing, if my memory of automobiles serves me correctly, you have to jack the thing up, don't you, to get the wheel off to get the bearing out? A. Right.

Q. In other words, the bearing is on the axle and the wheel goes around the bearing. A. Right.

Q. So that this particular mechanic, assuming that his first assignment was to repair a wheel bearing on a tractor that was inside the shop, his duty would have been to jack up the tractor, the engine, remove the wheel, and then remove the bearing? A. Well, under ordinary circumstances -- I don't know how he states it in there, but I mean if you had a tractor out in the yard that the wheel bearing had to be taken off, why, you would have to bring it into the shop and jack it and take the wheel off.

Q. That's what I mean, my friend.

There is actually no way to get a wheel bearing off without removing the wheel. A. That's right. You could get the outside bearing out.

42 Q. Okay.

Now, these particular wheels that are on this particular — on your tractor, generally speaking —

THE DEPUTY COMMISSIONER: Is this witness your friend also?

MR. FEISSNER: Everyone is my friend.

THE DEPUTY COMMISSIONER: I just wanted to make sure of that. Go ahead.

BY MR. FEISSNER:

Q. The gentleman that was just here stated, sir, that the wheels weigh approximately 80 to 100 pounds, as I recall.

Is that your — A. There are various sizes. It would be, on the average it would be about 90 I guess.

Q. About 90? A. Yes.

Q. Just for my own edification and perhaps for the Deputy Commissioner's, a chap who takes off wheels and replaces wheel bearings, in the lingo of mechanics is this considered heavy work or light duty?

A. It's — I've never classified it as either one. It's just part of a mechanic's duties.

Q. Okay.

43 THE DEPUTY COMMISSIONER: Well, would you consider it moderate?

THE WITNESS: Personally I don't consider it heavy work, no, sir, not in the sense of speaking of heavy work such as stevedoring.

THE DEPUTY COMMISSIONER: Would you consider it light work?

THE WITNESS: No. We have no light —

THE DEPUTY COMMISSIONER: Pardon me?

THE WITNESS: Well, it's not light in the sense of storing packages and mail, no, sir.

THE DEPUTY COMMISSIONER: Would you call it moderate work then?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: All right.

BY MR. FEISSNER:

Q. To carry out Mr. Adler's thought there, you said it would not be considered heavy in the light of stevedoring.

But we're speaking now —

THE DEPUTY COMMISSIONER: That was his thought, not mine. That was his testimony.

MR. FEISSNER: His thought, his testimony, yes, sir.

BY MR. FEISSNER:

Q. And so far as mechanics are concerned, you know, working
44 around trucks, would this be classified as heavy work for a mechanic or light work or moderate work? A. As far as — It's not broken down into a classification of whether a mechanic has heavy or light work to do.

It's —

Q. Well, let's put it this way, my friend. A. The only thing I could give you would be an opinion whether I considered that changing a tire was heavy work.

Q. Can you think of things that mechanics generally lift that are heavy generally than 90 pounds? I mean things that they do all day long that are heavier than 90 pounds? A. Well, I don't assume so.

Q. Sir? A. I don't assume so, no, that they lift things — There are some things that you can — that would be heavier work.

Q. Thank you very much.

MR. McCARTHY: Is that all you have?

MR. FEISSNER: Yes.

CROSS EXAMINATION

BY MR. McCARTHY:

Q. Do you have any evidence that this man had removed a wheel
45 on a tractor trailer the morning that he sustained this fatal heart attack? A. No, I don't.

Q. In the course of your investigation have you talked with employees of the corporation who were on the scene, at the site, at the time this occurred? A. Yes, sir.

Q. Did any of them tell you he had begun to remove a wheel in order to change this wheel bearing that morning before this attack occurred? A. No, they didn't.

Q. Isn't it true that the evidence was that he had not begun to do any work that morning prior to the time he had this attack? A. That's what is indicated by the people that I spoke to, yes.

Q. Whom did you speak to? A. I spoke to Robert Riegel, the shop foreman. Cecil Webster, and Dickman who was working at the time —

Q. I see. A. — that he came to work.

Q. Is Mr. Dickman the man whose statement we took and submitted to the administrative file here at the Commission at their request? A. That's right.

46 Q. We also took a statement from Mr. Riegel, did we not, and submitted it to the Commission at their request? A. Yes.

MR. FEISSNER: If the Commission has independent statements from witnesses that I don't have, I would certainly like to see them.

THE DEPUTY COMMISSIONER: In the course of developing an informal file, it is not unusual to acquire reports by people who may have something to say in the way of relevant or material information.

I can tell you that the administrative file does contain two typewritten reports, or rather two typewritten statements, over the signatures of a Robert C. Riegel and a Richard Wallace Dickman.

MR. FEISSNER: I have never seen them, sir. That's why I —

THE DEPUTY COMMISSIONER: I don't know, I understand that Mr. Riegel will be here to testify.

Of course, you have the right of cross examination, and we wouldn't put these statements in unless the parties were agreeable to it.

MR. FEISSNER: All right.

THE DEPUTY COMMISSIONER: If Mr. Riegel is going to be here, I suppose we could put his report in, because you could then cross examine him from the report.

47 However, I'll leave it up to you gentlemen.

Do you want the statements in?

MR. McCARTHY: Yes, I think they should go in.

MR. FEISSNER: I'd like to see what's going to go in, sir. I think I'm entitled to that.

MR. McCARTHY: I'll be happy to give you copies of them.

THE DEPUTY COMMISSIONER: Suppose we suspend this for just a moment or two until we complete — finish with this witness, and then we can go into the discussion of that matter.

MR. FEISSNER: All right.

THE DEPUTY COMMISSIONER: Because otherwise everybody gets knocked off their line of thought as to what they want to ask this gentleman.

Are you finished, Mr. Feissner?

MR. FEISSNER: He was questioning him.

No, I have some more questions on redirect.

THE DEPUTY COMMISSIONER: Mr. McCarthy, do you wish to continue?

MR. McCARTHY: No, I'm finished with Mr. Pierce for the —

THE DEPUTY COMMISSIONER: For the time being?

MR. McCARTHY: Yes.

THE DEPUTY COMMISSIONER: Mr. Pierce, what were the hours of duty of Mr. Wheatley?

48 THE WITNESS: His actual starting time was 8:30 in the morning. That would be his assigned starting time.

THE DEPUTY COMMISSIONER: All right.

On the day, on February 12th, 1964, he reported for work —

THE WITNESS: At 8:48.

THE DEPUTY COMMISSIONER: Was there any reason that you know for the 18 minutes tardy appearance for the job?

THE WITNESS: No, sir.

THE DEPUTY COMMISSIONER: Was that considered being late?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Had you ever observed Mr. Wheatley during his work, or does your job take you out of the area of his employment activities?

THE WITNESS: Most, in fact 95 per cent, of my work is out — had nothing to do with this shop.

I do — I did, and I do, spend some time down in the shop, mostly to check on a piece of equipment that is out of service and when it would be back.

THE DEPUTY COMMISSIONER: So your contact with Mr. Wheatley in person, or maybe observing him from a distance, would be just incidental —

49 THE WITNESS: Unless there was a specific reason, I'd go down to check, you know, one specific —

THE DEPUTY COMMISSIONER: Did you see him that morning?

THE WITNESS: No, sir, I wasn't at work that day.

THE DEPUTY COMMISSIONER: Mr. Pierce, I believe there are no further questions.

MR. FEISSNER: I have some.

THE DEPUTY COMMISSIONER: Oh, Mr. Feissner has some redirect.

Go ahead.

MR. FEISSNER: Thank you.

REDIRECT EXAMINATION

BY MR. FEISSNER:

Q. Mr. Pierce, my friend, in answer to one of counsel's questions, you stated —

THE DEPUTY COMMISSIONER: Which friend are you talking about now? You said your friend.

MR. FEISSNER: Excuse me, sir.

BY MR. FEISSNER:

Q. In answer to one of counsel's questions you stated that —

THE DEPUTY COMMISSIONER: You mean one of Mr. McCarthy's questions?

MR. FEISSNER: Yes, sir.

50 THE DEPUTY COMMISSIONER: All right.

BY MR. FEISSNER:

Q. (Continuing) — that there was no evidence that Mr. Wheatley had started to work on his truck.

I ask you if you recall in your state — or in the statement of your firm here, that Mr. Riegel in the report that you have in the Commissioner's file — it states he, Mr. Riegel, advised that after the conversation ended, subject Wheatley proceeded to the tractor and was working on the tractor the last that Mr. Riegel saw of him, at 9:15, and that the next thing we have is that at 9:30 a driver named Sumpter, S-u-m-p-t-e-r, of Baltimore City saw Mr. Wheatley coming from that area wiping his hands on a cloth?

Now, that seems, sir, to conflict.

Do you have an explanation? A. Well, no, other than I didn't write this report.

Q. I see. A. But in questioning Riegel, the shop foreman, about the time that the gentleman came to work and the time that it appeared that he had this attack, Riegel said that that piece of equipment had previously been worked on, and this was, to my way of understanding, completing the job.

Q. I see. A. But that what Ed had been doing had been getting his tools out, which they lock their tools up, they have a big tool box;

51 getting his tools out, setting everything up, bringing everything to the piece of equipment.

Q. In other words, you feel that this statement that he was working on the tractor the last Mr. Riegel saw of him is inaccurate? A. I didn't write that.

The only thing — When I asked Riegel — I spoke to him about the incident because I wasn't there and he advised that from what he could see, the man had not started on the job.

MR. McCARTHY: I have one question.

RECROSS EXAMINATION

BY MR. McCARTHY:

Q. You have mentioned 8:48. That's rather precise.

Do you have some corporate record that indicates when he punched the clock that morning? A. Yes, sir.

Q. All right.

MR. McCARTHY: I think maybe that had better be offered, Mr. Feissner.

I'll offer it in my case, unless you —

MR. FEISSNER: No. Certainly. Go ahead.

MR. McCARTHY: Then as a joint exhibit?

THE DEPUTY COMMISSIONER: Mr. Pierce has testified it was 8:48, that was the exact time, and I presume he has available information that has not been contested. There has been no effort to contradict it, and we can assume that that was correct.

52

MR. McCARTHY: Well, I just wanted to make sure it's correct, because there was some suggestion that he started between eight and eight-thirty.

This is the time clock record for that morning.

THE DEPUTY COMMISSIONER: And that says what?

THE WITNESS: It says 8.8, which is the hours broken down into ten-tenths.

THE DEPUTY COMMISSIONER: And that would be 8:48 —

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: — as you testified.

All right.

I might say this. In asking Mr. Pierce the question, before we got into this matter of the time that the deceased came to work, you read something, you asked for a clarification of a statement there which you said was in the file, the administrative file.

MR. FEISSNER: No, no, not the Deputy Commissioner's file. I meant in the evidence.

THE DEPUTY COMMISSIONER: All right.

You were referring to the Joint Exhibit Number One?

53

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISSIONER: All right.

Because I thought I heard you say "which is in the administrative file". All right.

MR. FEISSNER: That's all I have of this gentleman.

THE DEPUTY COMMISSIONER: Mr. McCarthy?

MR. McCARTHY: I have no further questions of Mr. Pierce.

THE DEPUTY COMMISSIONER: All right, Mr. Pierce, you may be excused now.

Thank you for your testimony.

(Witness excused.)

MR. FEISSNER: Can I see those two exhibits now?

THE DEPUTY COMMISSIONER: There are no exhibits.

MR. FEISSNER: I mean the statements.

THE DEPUTY COMMISSIONER: All right, Let's go off the record for a moment.

(Discussion off the record.)

Let's get back on the record.

Mr. Feissner, you of course have no further witnesses right now, is that correct?

MR. FEISSNER: Oh, yes, sir.

THE DEPUTY COMMISSIONER: You have one?

MR. FEISSNER: Yes, sir.

54 THE DEPUTY COMMISSIONER: Do you want to call him in?

MR. FEISSNER: Yes, sir.

Whereupon,

JOHN A. MORRONE

was called as a witness by and on behalf of the Claimant and, having first been duly sworn by The Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please tell the reporter your full name and your full address.

THE WITNESS: John A. Morrone. 2127 Haycock Road, Falls Church.

THE DEPUTY COMMISSIONER: That's Virginia.

THE WITNESS: Right.

THE DEPUTY COMMISSIONER: All right, Mr. Feissner.

DIRECT EXAMINATION

BY MR. FEISSNER:

Q. Sir, you are employed at Associated Transport. A. Yes.

Q. We are enquiring into an incident that allegedly took place on or about February 12th, regarding the death of one Edward Wheatley.

Were you present at that time? A. I was.

55 Q. Where were you, sir? A. I was walking across the yard to get my truck.

Q. When you say you were walking across the yard, were you walking towards something? A. I was walking towards the trucks, yes, parked over on the side.

Q. Where was that in relation to the shop, the mechanics shop? A. I'd say about 40 feet.

Q. Where did you see Mr. Wheatley? A. As I was nearing the truck, he was coming out from between the trucks.

Q. What was he — Was he doing anything with his hands? A. Well, at that particular time, I imagine he would be — it's kind of embarrassing, but I guess he was answering the call of Nature.

THE DEPUTY COMMISSIONER: I didn't quite get that last part.

He was what?

THE WITNESS: He was corresponding to an act of Nature, you know. He was back between the trucks there.

THE DEPUTY COMMISSIONER: You saw him between the trucks?

THE WITNESS: Yes, sir.

56 THE DEPUTY COMMISSIONER: Was he engaged in any particular activity there?

THE WITNESS: No. No.

THE DEPUTY COMMISSIONER: That you could identify that was connected with the employment?

THE WITNESS: No, nothing connected with the employment whatsoever.

THE DEPUTY COMMISSIONER: All right.

Go ahead.

BY MR. FEISSNER:

Q. What was your job with Associated Transport? A. I drive a truck.

Q. Did you see Mr. Wheatley at his job?

MR. McCARTHY: You're speaking now of this day or are you speaking broadly?

MR. FEISSNER: Broadly.

THE DEPUTY COMMISSIONER: Well, let's —

MR. FEISSNER: I'm trying to ascertain —

THE WITNESS: You mean over a period of time, sir?

BY MR. FEISSNER:

Q. Yes, sir. A. I have seen him at the — at his work, yes, sir.

Q. Where did he work? Do you know? A. How do you mean?

Q. Where did Mr. Wheatley work? A. He worked — He was a
57 mechanic. He worked in the shop.

Q. Now, tell us exactly what happened when Mr. Wheatley fell.

A. Well, we were approaching one another. I spoke to him. Mr. Wheatley, he was always a quiet-spoken man, and I said good morning to him and he just shook his head, as always, and then he made a motion like he was going to reach down to the ground to pick up something, and naturally having that there leg condition, why, he kind of put that leg back like this here, you know (demonstrating), and then he put both hands down as if to pick up something, and then he sprawled.

And, Geez, so I called to him right away, I said, Ed, are you all right, and he just looked up and kind of grinned like that, and —

Q. For what period of time did you see him immediately preceding his fall as you walked towards him? A. Oh, I guess — It was just a matter of minutes, you know.

Q. Was there anything unusual about him until the time that he fell?

A. No. No.

MR. FEISSNER: That's all I have.

THE DEPUTY COMMISSIONER: Mr. McCarthy.

58 CROSS EXAMINATION

BY MR. McCARTHY:

Q. Mr. Morrone, Mr. Wheatley did have a bad leg, did he?

A. Yes, sir.

Q. Stiff leg. A. A stiff leg, yes, sir.

Q. I see.

And he had had that ever since you knew him? A. Well, yes, as long as I have ever been in contact with him, he has had that stiff leg.

Q. He has had that stiff leg? A. Yes.

Q. Isn't it true that when you first saw him this morning, the morning of his death, he was between two pieces of equipment going to the bathroom? A. Yes, sir.

Q. And then when he finished that, he turned and walked toward you?

A. Toward me.

Q. And that when he got pretty close to you, he did what you have described? He looked as though he was bending over and he slumped right to the ground? A. Right.

Q. Did you check to determine his condition after he got on the

59 ground? A. No. Right away I called to the shop to Dickman and called him over and he come over right away and, of course, he called back to the boss and told him to call the ambulance.

The first thing he done was to check his pulse and stuff like that.

Q. I see. A. And he called to Mr. Riegel then and he called an ambulance.

THE DEPUTY COMMISSIONER: Mr. Morrone, try to speak a little slower so that the reporter can get every word you say.

All right, go ahead.

BY MR. McCARTHY:

Q. You did not see him working on a truck that morning prior to the time of his death? A. No, sir. No, sir.

Q. And was he carrying anything in his arms after he finished going to the bathroom and approached you? A. The only thing he had in his hand was a rag.

Q. A rag. A. Yes, sir.

Q. I see.

MR. McCARTHY: I don't think I have anything else, Mr. Commissioner.

60 REDIRECT EXAMINATION

BY MR. FEISSNER:

Q. Let me ask you this last question. A. Yes.

MR. McCARTHY: Would you indulge me a moment, please?

MR. FEISSNER: Certainly.

MR.McCARTHY: I have nothing further.

BY MR. FEISSNER:

Q. Do you recall being interviewed about this, somebody taking a tape recording of it? A. I was never approached for an interview other than the statement I made at that particular time.

I had a telephone conversation one time.

Q. A telephone conversation? A. Yes.

Q. Do you recall whether or not at that time that you had the telephone conversation whether you were able to determine what he had been doing between the two trucks and responding that you didn't know?

A. Yes, I was. I related the same statement then as I have now. I mean because there was nothing else to do, because I saw it. You know.

Q. Is that what people normally do out there who are in the shop?

61 A. Well, no, it's not.

But the condition that morning, there was snow on the ground yet and it was melting, you know, it was melting. And there was not a lot of snow, it was melting, and I imagine that – I don't know whether Mr. Wheatley even done much about climbing the steps. The bathroom is way in the back of the terminal.

And how close his condition was, why, I don't know.

Q. Was it cold that day? A. No.

Q. It wasn't? A. It was around about 40.

Q. But there was snow on the ground, melting snow? A. Melting snow, yes, sir.

Q. When Mr. Wheatley fell, in what direction was he heading?

A. He was heading back towards the shop.

MR. FEISSNER: That's all I have.

THE DEPUTY COMMISSIONER: All right, thank you for your testimony.

You may be excused.

THE WITNESS: Thank you.

(Witness excused.)

62 THE DEPUTY COMMISSIONER: Do you have any further lay witnesses.

MR. FEISSNER: No, I don't think I'll call any more employees of the employer.

THE DEPUTY COMMISSIONER: Let's go off the record for a moment.

(Discussion off the record)

Let's go back on the record.

Mr. Feissner, I believe you have a physician here to testify?

MR. FEISSNER: Yes, sir.

Whereupon,

JAMES E. CHAPMAN

was called as a witness by and on behalf of the Claimant and, having first been duly sworn by The Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your full name and your full address.

THE WITNESS: James E. Chapman, M.D., 2026 R Street, Northwest, Washington, D. C.

MR. FEISSNER: Mr. Adler, I would tender the witness as a qualified expert witness qualified in the field of internal medicine as well as being a general practitioner.

With the qualification as an internist I would submit him, unless you
63 want me to go through the school business.

MR. McCARTHY: I think we'd better have the qualifications.

MR. FEISSNER: All right.

THE DEPUTY COMMISSIONER: I'll tell you, you can make it very brief.

MR. FEISSNER: I'll let him make it brief.

THE DEPUTY COMMISSIONER: Where he is licensed and how long and so forth.

DIRECT EXAMINATION

BY MR. FEISSNER:

Q. Go ahead, Doctor. A. I graduated George Washington University School of Medicine in 1949, had a year of internship and three years of specialized training in internal medicine between 1949 and 1953.

I entered practice in Washington, D. C. in 1953.

Also I am licensed, as well as in the District of Columbia, in the State of Virginia, and maintain offices in Virginia as well as Washington, D. C.

Q. Did you ever have any special emphasis in your practice in treating the heart? A. Yes, sir, my practice is limited to internal medicine and cardiology.

64 Q. Cardiology being the study of hearts and heart disorders.

A. Yes, sir.

THE DEPUTY COMMISSIONER: Cardiology is your subspecialty?

THE WITNESS: Yes, sir.

BY MR. FEISSNER:

Q. How long have you been so engaged? A. Since 1953.

THE DEPUTY COMMISSIONER: Are you a member of any board?

THE WITNESS: No, sir, I'm not.

THE DEPUTY COMMISSIONER: That is, any medical board which would certify you in internal medicine or cardiology?

THE WITNESS: No, sir. I'm what is called Board-eligible, but I have not completed the requisites for certification.

THE DEPUTY COMMISSIONER: But in your practice you concentrate in the field of internal medicine and cardiology as a subspecialty?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Mr. McCarthy, do you wish to question Dr. Chapman as to his qualifications?

If not —

65 MR. McCARTHY: No, sir.

THE DEPUTY COMMISSIONER: All right, Mr. Feissner.

MR. FEISSNER: May I have that Joint Exhibit just a moment to use, Mr. Adler?

(The Deputy Commissioner handing document to Mr. Feissner.)

MR. FEISSNER: Thank you.

BY MR. FEISSNER:

Q. First of all, Dr. Chapman, have you examined the autopsy report from the Coroner's Office of the District of Columbia? A. Yes, sir.

Q. And have you had occasion to examine slides? A. Yes, sir.

Q. What were these slides of? A. Slides — There were four slides submitted by the D. C. Morgue in this particular case of Wheatley.

Two of them were of sections of the heart itself. The other two were other organs.

Q. Were these slides remarkable as they referred to this case — You are familiar with the history of the situation? A. Yes. I have the medical history in the case.

Q. What history — Let me put it completely on the record. Suppose I take just a moment.

66 I would like you to examine what is in the — what is in evidence as Exhibit One, the details of how Mr. Wheatley was injured, just going to pages one and two.

THE DEPUTY COMMISSIONER: Are you referring to Joint Exhibit Number One?

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISSIONER: Before we go into that, you spoke of medical history.

What do you mean by medical history? Did you know the claimant before his death — not the claimant, excuse me. Did you know Mr. Wheatley before his death?

THE WITNESS: No, sir.

THE DEPUTY COMMISSIONER: When you spoke of medical history, you were talking purely of an examination of the autopsy? Is that correct?

THE WITNESS: No, sir.

I think Mr. Feissner, when he used the term medical history, which I did not use, —

THE DEPUTY COMMISSIONER: That's right.

THE WITNESS: — he had reference to all of the medical information leading up to this man's demise and would include —

THE DEPUTY COMMISSIONER: All right.

So that was the autopsy report, and what else did you have available?

67 THE WITNESS: May I make a list for you, sir, —

THE DEPUTY COMMISSIONER: All right.

THE WITNESS: — of what I used in my —

THE DEPUTY COMMISSIONER: All right.

THE WITNESS: I used statements of coworkers. I have letters from Mrs. Wheatley pertaining to the patient's activities shortly before his final illness.

I have the autopsy report.

And lastly, I have the microscopic slides which I have studied.

These are the four elements which have gone into my —

THE DEPUTY COMMISSIONER: You have statements from witnesses?

THE WITNESS: These were supplied to me.

THE DEPUTY COMMISSIONER: Is that correct?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: Well, I think you had better not use those unless they are presented to you in this hearing on a hypothetical basis, because we don't know yet whether those statements will prove to be factual, or they will merely prove to be hearsay, and maybe guesswork.

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: That's why I was concerned about Mr. Feissner's referring to medical history.

68 I thought there was more of a background that you were familiar with.

From purely medical history you were acquainted then with the slides.

What kind of slides were they, by the way?

THE WITNESS: These are tissue sections mounted on microscopic slides.

THE DEPUTY COMMISSIONER: All right.

You are acquainted with them? At least you made a study of those slides?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: And you made an examination and study of the autopsy?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Are there any other medical items that you studied or observed?

THE WITNESS: May I ask counsel — You made a statement to me that this would be acceptable.

THE DEPUTY COMMISSIONER: Let's hold the record while the witness — Hold the record.

(Discussion off the record.)

Let's go back on the record.

MR. FEISSNER: Excuse me. I should have done this at the break, but I would like the Doctor to review what is in evidence now, and then I

69 will pose my hypothetical to him.

THE DEPUTY COMMISSIONER: All right.

BY MR. FEISSNER:

Q. Actually it's page two, but you can look at the whole thing.

(Mr. Feissner handing Joint Exhibit One to witness.)

A. (Examining exhibit.)

Q. Is that (indicating document) a report you made up, by the way?

A. Yes.

Q. Can I have it and give a copy to this gentleman? A. (Handing document to Mr. Feissner.)

THE DEPUTY COMMISSIONER: The record can show that a written report by Dr. Chapman was handed to Mr. Feissner.

BY MR. FEISSNER:

Q. Now, considering the report that you have just read — You have read Joint Exhibit Number One by reference.

Now, assume further that the deceased in this case, Edward Wheatley, was a person of reasonably good health for his age and had exhibited no prior manifestations of heart disorder, had no history of shortness of breath, pains in his arms or acute indigestion.

Assume further that at the time of his death he had been engaged

70 as shown in that report and had been coming from between two parked trucks, and that immediately prior to his death when he was seen by one of his coworkers he had no outward manifestations of any disorder or difficulty.

Based upon that assumption can you tell us when in your opinion the myocardial infarct was formed in relation to the cause of death?

MR. McCARTHY: Now, I'm going to object —

THE DEPUTY COMMISSIONER: Has it been established that there was a myocardial infarct in this case?

MR. FEISSNER: Yes, sir.

In your — This (exhibiting document) is in evidence.

THE DEPUTY COMMISSIONER: Well, it was myocardial insufficiency.

MR. FEISSNER: I'll call it that then, if I may, sir.

I'll amend the question.

BY MR. FEISSNER:

Q. When the myocardial insufficiency happened in relation to the time of death.

MR. McCARTHY: I'm going to object to that question.

There is no evidence in here that this man was engaged in any
71 activity that morning.

As a matter of fact, the evidence that has been adduced so far is to the contrary.

THE DEPUTY COMMISSIONER: I'll have to overrule your objection, Mr. McCarthy, because I think it is more in the sense of an argument.

Of course, it's a hypothetical question. The value of Dr. Chapman's answer to that question, of course, will depend on whether it is a fact that the deceased was engaged in any activity and the extent of that activity.

That, of course, has not been established.

I assume he's asking it in the vein of a hypothetical question.

MR. McCARTHY: I know.

With all due respect to the Commissioner, a hypothetical question — the hypotheses in such a question may only deal with facts which are in evidence.

As I understand the Commissioner's ruling, you are going to assume — Are you going to assume that he is going to at some later date offer — at some later time this morning offer evidence that the man was actually engaged in some strenuous activity?

THE DEPUTY COMMISSIONER: I am permitting the question and answer because there is always some chance or opportunity that the testimony that has been heard and maybe testimony that will be heard,

72 plus anything that has come in as an exhibit, may be a justification for raising the hypothetical question.

Of course, if there is no foundation in fact for the hypothetical question, of course, as I say, the value of the answer will of course depend upon that.

MR. McCARTHY: Well, my objection is that there is no foundation in fact at this time, and that should there be none subsequent to the Doctor's testimony, his testimony should be subject to my motion to strike.

THE DEPUTY COMMISSIONER: I'll overrule your objection and I'll let the hypothetical question be answered by the witness.

Go ahead.

BY MR. FEISSNER:

Q. And, if I may, as a caveat to the hypothetical question — In my hypothetical I asked you to assume the facts stated in this report, but I draw your specific attention to the statement, that the shop foreman stated that he was talking with the deceased at approximately 9:15 a.m. regarding his work assignments for the day, and that his first assignment was to repair a wheel bearing on a tractor that was inside the shop.

The shop foreman advised that after the conversation ended the deceased proceeded to the tractor and was working on the tractor the

73 last time the shop foreman saw him.

Now, with that caveat to the hypothetical question, can you now answer?

THE DEPUTY COMMISSIONER: I've already overruled Mr. McCarthy's objection.

Go ahead.

MR. FEISSNER: Yes, sir.

BY MR. FEISSNER:

Q. Can you answer the question? A. I'd like to ask you to repeat the question, if you would, please, so we can have it all before us.

THE DEPUTY COMMISSIONER: How about asking it all over again? You want to repeat the question, Mr. Feissner?

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISSIONER: Go ahead.

MR. FEISSNER: Thank you very much.

BY MR. FEISSNER:

Q. Assuming that we have a death on February the 12th, 1964, in approximately 40 degree weather, of a man —

THE DEPUTY COMMISSIONER: Four or 40?

MR. FEISSNER: 40. Four zero, sir.

BY MR. FEISSNER:

Q. (Continuing) — who was employed as a mechanic who worked
74 on tractor trailer trucks known as semi's.

Assume further that approximately 10 to 15 minutes before he was observed collapsing, his first assignment of the day was to repair a wheel bearing on a tractor and that the last time he was seen by the shop foreman he was in fact working on that tractor.

And assume further that in order to repair a wheel bearing it is necessary that the wheel be removed and the wheel weighs approximately 80 to 90 pounds.

And assume further that this individual was a person in reasonably good health and had no prior complaints of pain in the arms, indigestion, shortness of breath, pain in the chest.

Assume further that this individual had a 14-year record of working on the job and that he had no absences attributable to anything that might be considered a heart disorder.

Assume then that his history is reasonably — that his history as manifested by his work record and by his conduct with his wife is not

contrib — is not remarkable towards a heart attack, that he was seen by a fellow employee coming from between two parked trucks and immediately before his demise for a period of a minute or two as he was seen walking towards the shop he did not exhibit anything unusual, any grimace of pain, any difficulty of that nature, and that he suddenly collapsed

75 while it looked like he was bending over to pick up something.

Assuming those facts to be in evidence and assuming further the report you have read, Joint Exhibit No. 1 by reference, considering further the Coroner's autopsy report, your examination of the slides, can you tell us when the myocardial insufficiency occurred in relation to the time of death?

MR. McCARTHY: Now, I adopt my objection that I made before, and I assume the ruling will be the same.

THE DEPUTY COMMISSIONER: Mr. Feissner, you threw in a lot of other things that I don't think have come up in the testimony and I doubt will come up.

You spoke about something on marital relations, for one thing.

MR. FEISSNER: No, no, no. He had nothing unusual, nothing unusual observed by his wife in the marital relation is what I said, sir.

I believe you asked her if there had been anything unusual.

THE DEPUTY COMMISSIONER: I see.

Well, all right.

MR. McCARTHY: Well, specifically there is no evidence here that he had removed a wheel from a tractor or trailer this morning.

76 That was in his question.

THE DEPUTY COMMISSIONER: I'll let the answer in on the assumption that if that testimony hasn't come in yet, to establish that as a fact, perhaps Mr. Feissner will eventually do it.

MR. FEISSNER: I'm referring only to this record.

THE DEPUTY COMMISSIONER: Assuming that those things are established as facts, I think you can answer his question as to the relationship.

THE WITNESS: Thank you, sir.

MR. McCARTHY: The question didn't go as far as you have indicated.

THE DEPUTY COMMISSIONER: Well, I assume —

MR. FEISSNER: It will.

THE DEPUTY COMMISSIONER: I'm going to assume that the question contains certain items which we could say probably may not have been established at this point, and I don't know if they are ever going to be established during the course of this hearing.

But, as I say, It's still a hypothetical question, and it will depend, of course, — the value of the answer will depend on whether it is established that the hypotheses of the question are established as a fact or as a group of facts.

77 All right, Dr. Chapman, you may answer the question.

THE WITNESS: Thank you, sir.

We have a recital of facts here describing an internal medical catastrophe occurring in what appears to be an otherwise healthy individual approximately one-half — one and one-half to two hours after he reports to work at his normal place of duty and in his normal duties.

The described absence of any departure, medical or social or otherwise, from his usual activities during the preceding three or four days is worthy of note in that certain illnesses manifest themselves in advance of such a catastrophe, whereas others do not.

The suddenness of this man's illness and his rapid demise narrow the field of diagnostic possibilities to a few entities, principally — and this is on a statistical basis — disasters within the head, ruptures of blood vessels or heart, these being the principal immediate causes of such rapid loss of life.

The fact of activity of an individual before such a catastrophe as this is of somewhat limited value since, if one presumes that this was a heart episode, it is well known that almost half of heart episodes occur while patients are sleeping, with as little activity as they ever have; while it has also been documented that violent exertion or sudden unusual

78 physical stresses may similarly precipitate cardiac episodes.

The fact that —

MR. McCARTHY: Excuse me, Doctor.

May I interrupt this?

(Mr. McCarthy departed from the hearing room.)

(Mr. McCarthy returned to the hearing accompanied by Dr. Thomas.)

THE DEPUTY COMMISSIONER: Sorry to break in on your testimony. All right, you may go ahead.

THE WITNESS: I'll try to resume exactly —

BY MR. FEISSNER:

Q. She'll help you. A. — where I was.

MR. FEISSNER: Would you read back —

THE WITNESS: If you could, just the last sentence, perhaps.

(The reporter read back the witness' last sentence.)

The fact that there was no preceding history of heart disturbance cannot be relied upon to exclude death from heart attack.

The available history would indicate that death occurred within a few minutes or less of the beginning of the attack.

79 This fact is further documented by the microscopic study of tissue sections of the heart which reveal essentially no changes from normal except marked coronary arteriosclerosis and severe post mortem autolysis.

This term is used to denote the generalized softening and decay of tissue which occurs after death, regardless of the cause of death.

This lack of any microscopic finding is important to note because it requires at least an hour or more for the earliest cell changes to be noted in a heart following seizure.

So that if a patient's attack occurs within an hour of his death, one would expect no tissue evidence of the attack.

Stated still another way, the heart has to live long enough to develop the changes which describe its disease. In this instance described, this is not the case. The man was apparently dead within a few minutes of the time of his attack.

This is of value to the medical examiner in attempting to date back as to the time of the initial attack's beginning, which in this instance I would say would have to have been less than one hour of the time that he died.

80 The diagnosis of myocardial insufficiency and arteriosclerotic heart disease, as given in the hypothetical description, are usually not the causes of death in these cases.

The most likely cause of death in the case cited would be either a cardiac arrest or simple stoppage of the heart, or a sudden chaotic irregular heart action brought on by the attack, resulting in insufficient heart activity to sustain life.

Again, in reference to the history available, as from the statement of the patient's widow, this man did follow his normal activities up to the morning of his illness.

BY MR. FEISSNER:

Q. Well, Doctor, let us assume this further, that Mr. Wheatley came to work around a quarter of nine or so, and that he was interviewed by his shop foreman at around 9:15, and that, as indicated earlier, his assignment was to repair a wheel bearing on a tractor, which, as we indicated, required the wheel to be removed, and that the last thing that his shop foreman saw him do, he was in fact working on the tractor.

That at about 9:30 he went out to the yard and he in fact urinated, and as he was returning from this call of Nature to the shop to his duties, he fell to the ground as previously indicated.

81 Assuming these facts, what, in your opinion and judgment, is the relationship of his work duties, that is, the duties in the shop of repairing the wheel cylinder, to his eventual death?

MR. McCARTHY: I object to that question for the reason that I objected to the other hypothetical, that there is no foundation in fact for the assumptions which he is asking the Doctor to make, in this record.

THE DEPUTY COMMISSIONER: I'll let the question in because there are more witnesses to appear here at this hearing.

Specifically, I think, Mr. McCarthy, you pointed out that the shop superintendent or foreman will be here.

MR. McCARTHY: Yes, sir.

THE DEPUTY COMMISSIONER: And we still don't know what testimony we are going to get from him.

And inasmuch as we are taking the physicians a little out of order, I think I'll permit the question and answer to come in.

And, as I say again, the value of the answer to that question will depend on the — whether the hypothetical question is established to be factual.

I don't know, Mr. McCarthy, if you are doing that for the purpose of argument or really for the purpose of objecting.

82 However —

MR. McCARTHY: No. No.

THE DEPUTY COMMISSIONER: — you can proceed, Mr. Feissner.

MR. FEISSNER: All right.

BY MR. FEISSNER:

Q. You can answer the question, sir.

THE DEPUTY COMMISSIONER: Are you finished, Mr. Feissner?

MR. FEISSNER: As soon as he answers the question, sir.

THE WITNESS: My testimony has established, in my opinion, that the beginning of the attack leading to death must have had its inception within approximately one hour of the time of death.

If this is within one hour of death, then the time he reported to work would establish whether or not the attack began while he was at his place of employment or not.

I was going from information that said he reported for work at eight o'clock. If that is —

BY MR. FEISSNER:

Q. 8:45. A. 8:45

83 He was, I believe, by the record, pronounced dead at —

Q. Let us assume — A. — 9:45.

Q. Pronounced dead at the hospital.

But he dropped down at his place of employment at 9:30. A. Well, the document here, sir, indicates another time, 9:45 a.m.

I don't know which time we intend to use here.

The exact time of death is given as 10:22 at the hospital.

THE DEPUTY COMMISSIONER: All right.

THE WITNESS: What I'm trying to establish, Mr. Commissioner, is that the tissue findings —

THE DEPUTY COMMISSIONER: Well, let's assume that the 9:45 shown in the autopsy report is factual and will not be contradicted.

THE WITNESS: What I would like to point out is, in my opinion —

THE DEPUTY COMMISSIONER: Would it make any difference in your answer whether the time of collapse was 9:30 or 9:45?

THE WITNESS: Not materially, sir.

THE DEPUTY COMMISSIONER: In other words, would the time
84 element have any bearing —

THE WITNESS: Yes, sir, to this extent, in my opinion and from my observations. It is at least one hour before the cellular changes which I referred to in my previous testimony are detectable within the heart muscle itself.

THE DEPUTY COMMISSIONER: If I understand your testimony, you are trying to tell us that in order to see the damage resulting from the myocardial insufficiency, the attack and the death should be separated by something over an hour.

THE WITNESS: Yes, sir, that's correct.

THE DEPUTY COMMISSIONER: All right.

But I don't think that is particularly the inquiry that Mr. Feissner is making here.

I think he was getting to something a little more related to what we're interested in in —

THE WITNESS: Well, I'm leading up to that.

THE DEPUTY COMMISSIONER: — our work here.

THE WITNESS: Yes, sir.

I'm leading up to that, —

THE DEPUTY COMMISSIONER: All right.

THE WITNESS: — by saying that this man would have had to be at work — if he had come to work only a few minutes before, or if he had been at work three or four hours, might have a difference in the findings
85 that I have in the slides here.

The relationship of exertion is difficult to assess because of the occurrence of heart attacks, both at rest in many patients, and as well as those engaged in violent exertion.

In my opinion there is always a precipitating factor, regardless of whether the patient is at rest or exerting himself.

I believe that precipitating factors may vary.

In the case of the patient at rest I believe that the precipitating factor is a drop in blood pressure which occurs during rest which then excites the heart attack.

In the case of a patient undergoing violent exertion, it may be a rise in blood pressure which causes disruption of coronary flow.

It may be injury. Any precipitating event.

It is my opinion that in this case if this man was in fact moving a heavy object such as a truck wheel weighing some 80 to 100 pounds that a sudden violent motion of his incidental to moving this equipment in a man who we know had advanced coronary artery disease would have functioned as a precipitating event, bringing on his heart seizure and immediate demise.

86 THE DEPUTY COMMISSIONER: Mr. McCarthy.

CROSS EXAMINATION

BY MR. McCARTHY:

Q. You find no evidence in this history that you reviewed of any trauma to any part of the body, including the chest wall? A. No, sir. None was recorded.

Q. Yes.

And you predicate your opinion of causal relationship, if I understand, completely on assuming it to be true that he was involved in some violent activity shortly before he had the seizure. A. No, sir. Because I believe I testified that a person sitting or even sleeping can have an identical type of seizure.

Q. Well, let me see if I understand your testimony.

You say that obviously this man at some time — This man was prone, was he not, to a myocardial insufficiency because of his arteriosclerotic heart disease? A. The histologic evidence of coronary arteriosclerosis had been present for years in —

Q. Yes. A. — this particular case.

Q. Yes.

87 So at some time or other he would have had a heart attack — Let's put it this way.

It is more probable that he would have a heart attack than someone without this history of arteriosclerotic changes. A. May I ask for — He did not have a history of arteriosclerosis.

Your phraseology is —

Q. Well, can't we say — A. — not — There is no history of arteriosclerosis.

Q. Can't we say — A. He did not have it.

Q. — after we review the autopsy report that he had arteriosclerotic heart changes or heart disease? A. But this would produce no — This produced no symptoms in life that the man — that the patient himself would be aware of.

That was the —

Q. But he's prone. A. He's more susceptible.

Q. All right. A. More likely.

Q. All right.

Let's use that, more susceptible. A. To develop such disease,

88 yes, sir.

Q. And he can develop it when he's at bed rest because, as you say, there is a drop in the blood pressure when one is at rest which might excite — A. That's right.

Q. — the attack.

And similarly he could, I suppose, by walking or running or pushing a lawnmower — because he elevates his blood pressure this too could produce or be the precipitating factor of this heart attack.

Is that correct? A. It could be in certain instances, yes.

Q. Almost anything that he would do then could be a precipitating factor of a heart attack, a fatal heart attack. A. No, sir. Because I attempted to bring out in my previous testimony that this man went about his usual activities for three or four days before this, if I may detail this again.

Q. Yes. A. He went on shopping expeditions two or three days before this. He went to a Bible meeting, I believe the night before, without symptoms.

He had his usual breakfast the morning of his demise. Apparently he went to work with no symptoms.

89 Q. Do you know whether or not he had a cold at this time? A. I beg your pardon, sir?

Q. Do you know whether or not he had a cold on this morning? A. The only information I was given was that he went to a drugstore approximately a week beforehand to purchase medication.

But it is not known to me whether this medication was in fact for himself or someone else, or what he did with the medication.

That's all the information I have.

I can't answer your question because I don't have the information. I'm sorry.

Q. I wonder if I could see the letters that you have referred to from Mrs. Wheatley.

MR. FEISSNER: It's all right.

THE DEPUTY COMMISSIONER: I think we may be getting a little out of line here.

(Witness handing documents to Mr. McCarthy.)

Dr. Chapman, I think in your answers to the questions here you should confine yourself to the hypothetical question that is presented to you and not rely on some notes that you have that you got somehow talking to some of the people. Because I think it may influence your answers here, and they

90 are not part of the record.

This about the deceased having gone to get some prescription, did you say, filled?

MR. FEISSNER: I'll put that in, sir.

THE DEPUTY COMMISSIONER: Pardon me?

MR. FEISSNER: It's the history from the widow, but I'll be glad to put it in.

And the letter I'll put in also.

THE DEPUTY COMMISSIONER: What is the purpose of saying the deceased went to get a prescription, went to get a prescription filled? How does that tie up with a heart attack on February the 12th, 1964?

MR. FEISSNER: It indicates there was nothing wrong with the man.

THE DEPUTY COMMISSIONER: So far we have testimony that there was nothing wrong, except what was shown in the autopsy report.

MR. FEISSNER: This is the point the Doctor is trying to make, sir.

THE DEPUTY COMMISSIONER: Why is everybody struggling about that?

Apparently, Dr. Chapman, the testimony up to this point is that nobody had observed any conduct or any complaints by the deceased which would suggest to anyone that the man may have had a heart condition.

91 You have testified that on the basis of the autopsy report the man had arteriosclerotic heart disease.

THE WITNESS: That's right.

THE DEPUTY COMMISSIONER: Would it be correct to say that that was pre-existing?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: And from a medical standpoint would it be correct also to consider that it is a progressive disease?

THE WITNESS: Yes, sir. It is.

THE DEPUTY COMMISSIONER: And as a progressive disease it was bound to lead to some terminal point. Correct?

THE WITNESS: Well, this is difficult to answer because people can develop other diseases.

THE DEPUTY COMMISSIONER: That's right.

THE WITNESS: Assuming he had no other affliction, then, this would be a likely possibility.

THE DEPUTY COMMISSIONER: I'm assuming if he didn't die from cancer or anything like that beforehand.

But it is a progressive disease, and as Mr. McCarthy asked you before, it might make the man susceptible to a heart attack?

THE WITNESS: Yes, sir.

92 THE DEPUTY COMMISSIONER: All right.

Mr. Feissner presented a hypothetical question to you in which he indicated that assuming the man had been engaged in removing a wheel from a tractor and so forth.

Now let's take the other side of the picture. Let's assume that the man reported to work at 8:48, and let us assume further that from that time until he collapsed on the floor he was not engaged in any heavy duties, in other words, he wasn't performing any strenuous physical efforts, but he was on the premises and, as far as any observation of his activities was had, was nothing more than walking around or going from one place to the other, perhaps taking a tool out of a box.

Assuming that that is established as a fact, do you think that that is a sufficient cause to precipitate a myocardial insufficiency, or rather to aggravate a myocardial insufficiency that may have been coming onto the scene?

THE WITNESS: Having established that he couldn't have had an attack beginning more than 45 minutes prior to his death, we have to take the opinion that something happened between 45 minutes before the end of his life, or one hour before the end of his life, and the end of his life which initiated or precipitated a heart seizure.

THE DEPUTY COMMISSIONER: All right.

93 Now, the autopsy report —

THE WITNESS: This could have been —

THE DEPUTY COMMISSIONER: — indicates that a myocardial insufficiency took place.

Is that correct?

THE WITNESS: That's a general —

THE DEPUTY COMMISSIONER: Between the time —

THE WITNESS: — term. Yes, sir. That's a general term.

THE DEPUTY COMMISSIONER: All right.

Now, the question is, the myocardial insufficiency is something that happens in a man's heart, is that correct? It's something very personal to a man.

THE WITNESS: I don't quite understand your question.

THE DEPUTY COMMISSIONER: If you have a myocardial insufficiency, you have it in your heart.

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: If Mr. Wheatley had it, it was in his heart, something personal to him. Is that correct?

THE WITNESS: Myocardial insufficiency in itself is not necessarily a fatal condition.

THE DEPUTY COMMISSIONER: I didn't ask you whether it was fatal.

94 He had a heart attack which we understand it to be a myocardial insufficiency.

Is that correct?

THE WITNESS: Well, may I — May we go off the record for just a moment, sir, with your permission?

THE DEPUTY COMMISSIONER: All right, let's go off the record.

(Discussion off the record.)

Let's go back on the record.

I think, as I stated a little earlier, I understood that your answer to Mr. McCarthy's question was that a man with a — arteriosclerotic heart disease was susceptible to a myocardial insufficiency.

THE WITNESS: (Nodding head.)

THE DEPUTY COMMISSIONER: All right.

Now, what I'm trying to find out, Dr. Chapman, is from — is if you from a reasonable medical opinion can tie up the employment activities

in this respect: Did the employment activities precipitate a myocardial insufficiency?

THE WITNESS: This is on the hypothetical —

THE DEPUTY COMMISSIONER: That's right. And if you think so, what activities of the employment do you base it on?

THE WITNESS: Yes, sir. I have established that in my opinion the man's seizure and ultimate demise must have begun and been concluded
95 in death during the time the man was actively employed.

If any activity between the time he went to work and the time of his death either occasioned brief violent physical exertion or severe emotional stress or strain or any other physical stress or strain, either work-induced or self-induced, this could have been a precipitating event for the beginning and conclusion of this heart seizure.

THE DEPUTY COMMISSIONER: Then if I understand you correctly — Because, after all, I'm going to be the one who will have to struggle with the answers — If I understand you, then, it is your testimony that if there had been an emotional upheaval or some extraordinary emotional disturbance or there had been some, you said violent activity — Can we use the word stremuous physical effort?

THE WITNESS: Yes, sir, that would be —

THE DEPUTY COMMISSIONER: If those things were present at the time that he seemed to have some difficulty in having his heart function in a normal way, or at least absent any insufficiency, then there could be a relationship between his work activities and his pre-existing arteriosclerotic heart disease? There would be a relationship?

96 THE WITNESS: No, sir, not between his work activities and his pre-existing heart disease.

This was independent, his heart disease was developing regardless of whether he was a doctor or mechanic.

THE DEPUTY COMMISSIONER: All right then, we'll say myocardial insufficiency.

THE WITNESS: Yes, sir. Yes, sir. I'll accept that.

THE DEPUTY COMMISSIONER: Now, on the other hand, let's say if there was absent any emotional upheaval or extraordinary disturbance, any extraordinary emotional disturbance, and that the deceased did not engage in any strenuous physical effort, would you therefore feel that there could be any relationship between the employment and the cause of his death?

THE WITNESS: Yes, sir. But now limited to the fact that the histologic evidence alone would be the only evidence to document that this man's attack began and ended — began after he got to work and ended while he was still at work.

THE DEPUTY COMMISSIONER: Are you saying that you are relating the two only by the mere fact that he was present on the premises at the time that it happened?

THE WITNESS: Only in the latter instance, the second instance which you have referred to.

97 THE DEPUTY COMMISSIONER: I see.

So in the second instance you are only relating it by the mere fact of the time element of his appearance on the premises of the employer ready for work.

Is that correct?

THE WITNESS: And the tissue changes.

THE DEPUTY COMMISSIONER: And the unfortunate event taking place while he still was on the premises.

THE WITNESS: Yes, sir. Backed up —

THE DEPUTY COMMISSIONER: That's the only way you can relate it under the second illustration or the second hypothetical question.

THE WITNESS: Yes, sir.

But I want to emphasize, sir, if I may, backed up by the histologic evidence, which does not reveal any evidence of cellular changes, which dates it within an hour, approximately an hour, of the time of the actual seizure.

It has to have begun within an hour.

THE DEPUTY COMMISSIONER: Mr. McCarthy.

BY MR. McCARTHY:

Q. Is that hour a hard and fast time?

I understood you to say an hour to an hour and a half earlier.

A. Yes, this is true. This is not —

98 Q. An hour to an hour and a half? A. Yes, sir. It is not a stop-watch type of thing. This could be variable.

Q. And you are speaking, are you, Doctor, of the onset of the problems that culminated in the fatal attack? A. Yes, sir.

Q. So that we can say for certain that for at least an hour, and for perhaps as much as an hour and a half, this myocardial insufficiency was developing progressively and had culminated in the fatal attack? A. No, sir. It could have been present for only one minute.

I said not more than an hour - an hour and a half.

Q. All right. A. It could have been as little as one minute, you see.

Q. All right. A. It only means less than that amount of time.

Now, I can't —

Q. Now, if it were only present for one minute, what would have been the precipitating factor? Would direct trauma be? A. If there were trauma, sir. But I don't have any history of trauma.

Q. No, no. I'm just asking you.

99 You say that the process could have begun one minute before the fatal attack. A. (Nodding head.)

Q. Or as long as one hour and a half before? A. That's true.

Q. Now, let's go to the one minute.

If the onset of it was a minute before the fatal attack, what would have been that precipitating factor?

Could trauma have been it? A. If there were trauma, yes.

Q. Could severe —

THE DEPUTY COMMISSIONER: When you use the word "trauma", you're talking specifically of an impact type of trauma, or a strenuous physical —

MR. McCARTHY: Physical injury.

THE WITNESS: I assumed physical injury to the chest.

Is that what you —

BY MR. McCARTHY:

Q. Well, I was going to get to that.

I just said trauma, and I understood — I meant physical injury.

Could that produce it? A. If it were to the chest, yes. But —

100 Q. Okay. It's got to be to the chest. A. It would have to be to the chest.

Q. But there is no evidence of that in this case. A. It would have to be a massive type of injury.

Q. What other precipitating factor could there be to this type of an attack which would all take place within a minute? A. I'm not quite sure I —

Q. Well, I thought we had established that in someone who was susceptible and prone, there must be a precipitating factor to — A. Oh.

Q. — bring on the attack.

Is that correct? A. Yes.

Q. All right.

That could be a drop in blood pressure as a consequence of being asleep. A. Yes.

Q. Okay.

Now, we were talking about — or you mentioned you could have the onset one minute before — A. (Nodding head.)

Q. — the attack. A. Yes.

101 Q. Now, what other than trauma would be the precipitating factor for that onset one minute before it culminates in the attack? A. Any other strain or exertion situation.

Q. I see.

Emotional or physical? A. Either, yes.

Q. Suppose someone had to go to the bathroom rather badly?

A. I was going to say straining to void, straining at the stool.

Straining —

Q. Straining to urinate? A. Yes.

Straining during intercourse. People have coronary occlusions during sexual intercourse.

By any exertion such as this.

A violent argument, a very intense emotional feeling, could be a precipitating factor.

Q. There are really a great, great many precipitating factors in this case that would be wholly unrelated to his employment except by geography.

Is that correct, Doctor? A. You say a lot that would be related?

Q. Unrelated to his employment except by geography. A. There
02 are a lot of things —

THE DEPUTY COMMISSIONER: I think you are asking the Doctor for a conclusion there, Mr. McCarthy.

MR. McCARTHY: Well, he has given some —

THE WITNESS: — that are unrelated.

MR. McCARTHY: — conclusions, he has given some opinions, and I don't think I am precluded from asking for an opinion.

THE DEPUTY COMMISSIONER: I think he has answered some hypothetical questions, and I think he indicated in answer to my question where I said absent any emotional upheaval or disturbance or any strenuous physical effort, that the only way he could tie that in with the employment would be the fact that he was on the premises. That's the only relation he found between the two.

MR. McCARTHY: Fine. I had forgotten that you had developed that, sir.

BY MR. McCARTHY:

Q. Now, you, of course, looked at the autopsy report which indicates that this occurred about 9:45.

There has been other testimony here that it occurred about 9:30, that is, Mr. Wheatley slumped to the ground at about 9:30.

It is uncontroverted that he punched in at the employment at 8:48 that morning.

03 Now, let me ask you this, Doctor Chapman. From what you said it is entirely possible that the onset of these symptoms began at eight o'clock that morning while he was at home? A. My opinion is otherwise.

It is possible, but my opinion is otherwise.

Q. Well, didn't you say earlier here that you had assumed that he got to work at about eight o'clock in the morning, or something of that sort? A. Well, that was in one document that I reviewed.

But if I may return to my original statement, the slides indicate that the event must have been within an hour or an hour and a half, regardless of when he came to work.

I don't have the evidence of the time this man reported.

Q. Yes, I understand, but I want you to follow me, if I'm making myself clear. A. Yes, sir.

Q. We have established that there must be a precipitating factor. Is that correct? A. Yes.

Q. We have established that there will be no cellular evidence, microscopically, if the death occurs within an hour or an hour and a half
104 of the onset of the attack. A. In general. In general, yes.

Q. All right.

Now, if we assume that this death occurred at 9:45, we go back one hour and a half to 8:15, and you can't tell us whether these symptoms began at 8:15.

They could very well have been -- the onset of this have been at 8:15 a.m.? A. It's within the realm of medical possibility.

Q. Well, it's just as possible, is it not, Doctor, as any other opinion that you have expressed here? A. No, sir. We --

Q. It's not? Excuse me. Go ahead. I'm sorry. A. We're developing the fact that the man had no symptoms since the testimony has, I believe, established that he talked to his foreman about 9:15, which would be half an hour after he reported for work.

And if we get into a hypothetical situation, we assume that this is a prudent individual, who if he had been feeling ill or in any way uncomfortable, he would have mentioned it to his foreman as to whether he was or was not ill.

If we assume that he was apparently still in good health at this time, then something must have happened even after this.

105 But again I don't have -- Again this is a hypothetical situation.

Q. Well then, I take it that what you are saying is that because he had spoken with his foreman at 9:15, he was assumed without complaint of injury or without feeling ill, and then the onset of this must have been between 9:15 and 9:30 or 9:45. A. It could have been.

Q. It could have been? A. It could have been.

Q. What is this hypertrophy that Dr Rayford mentions here in his autopsy report?

What is that? A. That refers to generalized enlargement of the heart. More specifically thickening of the left side of the heart usually.

Q. Is this -- A. Of the wall.

Q. Is this hypertrophy and this arteriosclerotic heart disease merely part and parcel of growing old? A. I think we could say that the medical opinion is generally that arteriosclerosis is an inevitable process of seniority, in varying degrees, however.

Q. Yes.

106 A. There is no fixed rule.

The hypertrolphy is medically a more specific entity in that it has to presume that there has been some reason for the heart enlarging which antedated the development of this condition. For example a valve disorder of the heart, hypertension, possibly a hypertension, high blood pressure condition. These would be the two most likely causes of the hypertrophy which he referred to here.

Q. So that he had some heart disorder prior to -- A. (Nodding head.)

Q. Apart from the arteriosclerosis? A. (Nodding head.)

But there was no valvular disease mentioned in the protocol.

So that exploring the point here, you would have to raise the question of whether the man may not have had some other reason for hypertrophy.

I might help a little more, if I may, sir.

The mere presence of arteriosclerosis does not necessarily mean there has to be hypertrophy. You may have one without the other.

Q. Yes. A. So there must be some other reason here which we don't have any evidence of.

Q. But with arteriosclerosis and in the absence of some other dis-
107 ease or accident, it will culminate in precisely what happened to Mr. Wheatley? A. Oh, yes.

Q. And that could happen at any time, at any place? A. I can't answer that yes because I previously testified that you must have the predisposing condition, which this man had, and then you must have a precipitating event.

And it is the relationship of the precipitating event and the time documentation which I have established here which confines our interest to an hour and a half to two hours or an hour to an hour and a half before his actual death.

Medically I must focus my attention on this hour-hour and a half interval between -- not more than that -- between that and his death.

Q. Between eight o'clock and the time of death? A. Well, whenever an hour and a half is.

Q. Or 8:15, or whatever. A. You see, I must beg off on this time issue because on the official record of the District of Columbia it says the time of death was 10:22.

Q. Well, that was the -- Yes, I see. A. You see, I would rather not say this man had his demise at a certain hour, because the record itself is
108 in conflict.

Q. I see. A. The medical opinion of when death occurred itself is, as you know better than I, is a touchy subject sometimes.

MR. McCARTHY: I've nothing further.

THE DEPUTY COMMISSIONER: I must go back to what I have asked you just to clarify a bit.

You did testify, of course, that some people while they are asleep --

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: --can have a heart attack.

Now, the myocardial insufficiency would be the result of the narrowing of the arteries in the heart. Is that correct?

THE WITNESS: Yes, sir, the generalized heart inadequacy.

THE DEPUTY COMMISSIONER: In other words, a man may be sitting on a chair and undergo a myocardial insufficiency because the arteriosclerotic process is narrowing the vessels to such an extent that he is now having trouble getting merely enough blood to do that.

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: So we don't really need an outside

109 precipitating factor in order to have the heart attack, with a man who has arteriosclerotic heart disease?

THE WITNESS: No, sir.

I have to persist in my opinion that there is a -- there must be a precipitating factor of one type or another.

In many instances if you look inside this coronary artery you will find a small rough area of what we call arteriosclerotic plaque which has actually been sort of -- just sort of peeled off the wall because there has been bleeding behind it brought on by a sudden exertion and has broken a small blood vessel and the plaque is pushed down and the artery shuts off.

THE DEPUTY COMMISSIONER: Are you referring to that as a precipitating factor? Is that what your understanding is?

THE WITNESS: That's mechanically what happens during the precipitating event.

THE DEPUTY COMMISSIONER: There may be a little difficulty that we're encountering here in the fact that when we talk of a precipitating factor, we're talking as Workmen's Compensation people, and you're talking purely as a physician, and I think you are shunting away a little from the Workmen's Compensation principles.

110 When I understand precipitating factor coming up, I understand that to mean something in addition that comes from the outside.

That's why I mentioned to you that a heart attack is something personal to the man.

Now, there must be something from the outside that adds to it.

THE WITNESS: Yes, that's correct.

THE DEPUTY COMMISSIONER: And you did admit that if we have the absence of emotional upheaval or the absence of strenuous physical effort, then the only way that you can say that it is related to his employment is because he was there on the job, he was on the premises, that's the only relationship you would find.

THE WITNESS: Yes, sir, that the heart attack began and concluded while he was on the premises.

THE DEPUTY COMMISSIONER: That's right.

In other words, if he got on the job at 8:48 and he sat down on a chair and read the newspaper until five o'clock and did nothing else but read the newspaper until five o'clock, and at that time he had his heart attack, then you would likewise tie up the heart attack to the employment only because he was on the premises for the eight or nine hours.

Is that correct?

111 THE WITNESS: Yes, sir, provided we can exclude any other stress situation which --

THE DEPUTY COMMISSIONER: Well, while he was on the premises, it would be no different than if he were in the grocery store or at his home.

THE WITNESS: If he had a precipitating event under those circumstances, yes.

THE DEPUTY COMMISSIONER: If he had a precipitating event, if in the grocery store he tried to pick up a sack of flour weighing 100 pounds, that could be a precipitating factor.

THE WITNESS: It could possibly be.

THE DEPUTY COMMISSIONER: Or if at home he tried to move a heavy trunk, that could be a precipitating factor.

THE WITNESS: That's also possible.

THE DEPUTY COMMISSIONER: Or if he got into a very extraordinary emotional disturbance because of an argument with his neighbor, that could be a precipitating factor.

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Any further questions?

MR. FEISSNER: One further question.

THE DEPUTY COMMISSIONER: Go ahead.

112 REDIRECT EXAMINATION

BY MR. FEISSNER:

Q. Dr. Chapman, in line with the thought developed by Mr. McCarthy, dealing now not in possibilities, but in probabilities and expressing an opinion with reasonable medical certainty, considering the fact that this man had a discussion with his shop foreman at 9:15 before he went to work on the wheel bearing, considering that factor, where in your judgment lies the reasonable probability of when the attack took place? Before or after the 9:15 discussion with his employer?

THE DEPUTY COMMISSIONER: I think the Doctor has answered that.

He said the myocardial insufficiency could have taken place five minutes before he came to work, five minutes before he did any activity at all.

And I think he answered in the affirmative to your question that if the man was doing heavy physical work that that could have precipitated the --

MR. FEISSNER: What I'm trying to bring out, Mr. Adler, is --

THE DEPUTY COMMISSIONER: I think he has testified to that already.

MR. FEISSNER: I'm trying to indicate for the record, sir, that he said these things could happen.

113 Anything could happen.

I'm trying to put it in the realm of probability, that if the man had had the attack at the time suggested by my friend that he probably wouldn't have been having a gentlemanly discussion with his employer about where he might go.

This is the point I'm trying to make.

You have indicated that it could have happened while reading a newspaper or some such thing as that.

I'm attempting to delineate it in point of time.

THE DEPUTY COMMISSIONER: I didn't say that.

I was merely using --

MR. FEISSNER: As an example.

THE DEPUTY COMMISSIONER: -- that as an example.

MR. FEISSNER: Of course.

BY MR. FEISSNER:

Q. Can you tell us in your judgment and expressing a judgment in probabilities rather than in possibilities now and saying it with reasonable medical certainty, would this attack, which has obviously taken place in this man, would it precede 9:15 or be after 9:15, after the discussion with his employer? A. Mr. Feissner, as I previously indicated in discussion with Mr. McCarthy, I thought it was a reasonable probability that this attack began after the 9:15 conference.

114 Q. And anything before 9:15 is a possibility? A. Is a possiblity, yes,

MR. FEISSNER: That's all I have.

MR. McCARTHY: Nothing further.

THE DEPUTY COMMISSIONER: Thank you very much for your testimony, Dr. Chapman.

You may be excused now.

(Witness excused.)

All right, Mr. Feissner, do you have any other professional witnesses?

MR. FEISSNER: This gentleman has a witness. My witnesses are not professional witnesses.

THE DEPUTY COMMISSIONER: Mr. McCarthy, do you have a physician to testify on behalf of your client?

MR. McCARTHY: Yes, indeed.

THE DEPUTY COMMISSIONER: All right.

Whereupon,

LAWRENCE J. THOMAS

was called as a witness by and on behalf of the Respondents, and having first been duly sworn by the Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your full name and your full address.

THE WITNESS: Lawrence J. Thomas. 1712 Eye Street, Northwest.

115 THE DEPUTY COMMISSIONER: That's in Washington, D. C.?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: Mr. McCarthy, do you wish to qualify Dr. Thomas?

MR. McCARTHY: Yes, I'd like to.

DIRECT EXAMINATION

BY MR. McCARTHY:

Q. Dr. Thomas, I wonder if you would please state your medical qualifications, that is your education —

MR. FEISSNER: I would accept the Doctor's qual --

MR. McCARTHY: Well, I want to develop his qualifications.

THE WITNESS: Well, I graduated from George Washington University in 1938. I interned in New York City Hospital and Gouvernor Hospital.

Following that I was an assistant resident in medicine at the Gallinger Hospital, now called the District of Columbia General Hospital.

Following that I had two years of fellowship at George Washington University in medicine.

Subsequent to that I was appointed as a clinical instructor in medicine at George Washington University.

116 At present I am Assistant Clinical Professor of Medicine at George Washington University and practice internal medicine in Washington.

BY MR. McCARTHY:

Q. What about Boards, Doctor? A. I am certified by the American Board of Internal Medicine, in 1953.

Q. I wonder if you could tell us whether or not you have a subspecialty in cardiology? A. No, I have no subspecialty in cardiology, but, as most internists do, we have a good portion of our work which consists of treating patients with heart disease.

Q. I see.

And that has been true ever since you have had your Boards in internal medicine? A. Yes, sir.

Q. Now, Doctor, perhaps we can shorten things because you sat here and heard a great deal of Dr. Chapman's testimony.

But I would just like you to assume a couple of basic facts and then I will ask you a question.

I want you to assume that the deceased here reported for work at 8:48 on that morning, the temperature was about 40 degrees outside, there was melting snow on the ground, he was employed as a mechanic and that

117 at about 9:15 he spoke with the shop foreman who gave him instructions for the work he was to undertake that morning involving the changing of a wheel bearing.

I want you to further assume that this job had been begun at some other earlier time, in other words, he was to complete the job.

I want you to assume that there is no evidence that he began that job that morning prior to the time, about 9:30 or maybe shortly thereafter, when he had to urinate and instead of going to the back of the building and up a flight of stairs, he walked out into the yard where these trucks were parked and urinated between two trucks.

When he finished he turned around and was retracing his steps a distance, I think, of some 50 to 75 feet, and as he approached a fellow employee he suddenly appeared to be stooping over, but actually was collapsing, fell to the ground, opened his eyes once and then closed them.

I want you to assume that -- I might say that this is not yet in evidence, but will be -- that the shop foreman was immediately summoned and that this man took his pulse and found no pulse count at that time.

Subsequently he was moved by a fire department ambulance to Casualty Hospital where he was pronounced dead and was transferred
118 to the morgue.

Now, I would like to know whether or not, keeping in mind that you have seen the autopsy report from the Coroner's office of the District of Columbia, the death certificate from the Bureau of Vital Statistics, both of which are in evidence, whether or not, based upon the facts as I have outlined them and the documentation you have looked at, whether you have an opinion as to whether or not the death arose out of or in the course of the employment.

MR. FEISSNER: We would object for the record, sir, that the hypothetical does not contain all the facts, does not contain the correct facts in evidence, since the employer's own report shows that the man had begun work.

I would like to preserve that objection.

THE DEPUTY COMMISSIONER: You can answer the question.

The objection is overruled.

THE WITNESS: Under the circumstances and assumptions that you describe, I am basing -- and taking into consideration the autopsy report, I would say that the death that ensued was not the result of any activity involved in this man's employment.

BY MR. McCARTHY:

Q. Can you give us the reasons for your -- the opinion you just
119 expressed, Doctor? From a medical point of view. A. Well, according to the autopsy report this man had generalized arteriosclerosis with significant narrowing of the coronary arteries, and, as Dr. Chapman has indicated to you, anything can cause a sudden demise under these circumstances.

And, as he has pointed out, this can happen in the course of a patient sitting in bed or lying in bed or relaxing or sitting in a chair watching television, without necessarily having any exertion.

The absence of any specific stimulating or exertional episode makes me feel that the attack was in no way related to his employment.

It is conceivable that the mere fact of urinating and the stress and strain of trying to urinate on a cold day -- which also is a factor, because coronary artery disease is affected adversely by cold, it produces constriction of blood vessels and it may increase the tendency or the propensity towards heart attacks or sudden death -- these factors alone could have been sufficient to produce this death rather than any activity that the individual was in at the time of his death.

Q. Someone with marked arteriosclerosis such as Mr. Wheatley had, must there be a precipitating factor, or isn't the fact of that disease itself
120 competent to produce the attack? A. I was interested in the discussion that you had about cause.

I have here a little thing that perhaps you might want to read some time in the future. It is a report of the Committee on the Effect of Strain and Trauma on the Heart and Great Blood Vessels of the American Heart Association.

They take up this question of etiology and cause, and if I might, I would like to read an excerpt.

It's just a short paragraph.

THE DEPUTY COMMISSIONER: Well, I don't know if Mr. Feissner will permit it. I mean if you're asking me whether you can do it. Of course we want the testimony of the physician who has either examined the deceased or had treated the deceased or has taken an autopsy or has examined the autopsy report.

Of course what you have would be basically a statistical report based on a study of different patients.

THE WITNESS: (Nodding head.)

THE DEPUTY COMMISSIONER: However, if Mr. Feissner has no objection --

MR. FEISSNER: I've read that thing. It was put out by the insurance industry, a study financed by the insurance industry.

121 THE DEPUTY COMMISSIONER: All you have to tell me is whether you object.

MR. FEISSNER: I don't think it's appropriate. The Doctor might want to refer to it.

BY MR. McCARTHY:

Q. Based upon your experience, practical experience, including your reading of medical journals and periodicals, what is the relationship between stress, trauma and heart disease in one predisposed as Mr. Wheatley was? A. If there is a proven situation where there has been unusual stress or strain, this could conceivably help to provoke a heart attack which would result in death.

One does not have to have this type of stress or strain, in a patient either with or without arteriosclerosis.

In a patient who has as much narrowing of the coronary blood vessels as was documented by the autopsy report, the probability of sudden death occurring is much greater than in a patient who doesn't have any such coronary artery disease, in the absence of any stress situation, be it emotional or physical.

On the information, or from the information that I was allowed to read, I would say that there was nothing in the history or the events that
122 were given to me that would make me feel that anything that happened to the deceased on that particular morning may have been a precipitating factor in that respect.

Q. Did I understand you to say that in one who has an arteriosclerotic heart disease to as marked a degree as Mr. Wheatley did there need be no precipitating factor? A. That's quite so.

Q. Mechanically, mechanically, Dr. Thomas, is it true that you get, either because of the narrowing and the constricture, you close, actually close the artery or come very close to closing it, or possibly a clot or a piece of the lining of the artery will drop off and block the passage into the heart? A. (Nodding head.)

Q. Is that true? A. That's true.

Q. Do we know which happened in this situation from the meagre medical information that we have available? A. From the autopsy report one cannot determine the presence or absence of such a situation, of such situations as you have described, either an actual closing or a breaking off of a little plaque on the inside of the blood vessel.

All the autopsy report says is that there is marked coronary arterio-
123 sclerosis.

Q. And myocardial insufficiency. A. And myocardial insufficiency.

Q. Which could have been the result of either of the causes that we discussed, a narrowing to closure, or the breaking off of a plaque, as you say. A. Yes.

MR. McCARTHY: I don't think I have any further questions of Dr. Thomas.

THE DEPUTY COMMISSIONER: Mr. Feissner:

CROSS EXAMINATION

BY MR. FEISSNER:

Q. Doctor, you have indicated that it was marked arteriosclerosis.

You are referring just to this Exhibit No. 2, the typewritten one-page report called Autopsy Report? A. That's the only information I have.

Q. So by marked you don't know whether he means one centimeter or five centimeters.

Is that right? A. That is quite true.

But when an autopsy report comes back with "Marked coronary arteriosclerosis", it would be more than a medium or mild -- I mean "marked" would connote to my mind a more severe degree of arteriosclerosis.

124 Q. And everyone who is in the age of near 60 has arteriosclerosis, don't they? A. In varying degrees, yes.

Q. And according to the evidence, apparently, that you have been furnished, this arteriosclerosis wasn't so marked that it prevented this man from doing his normal duties right up to the time of his death.

A. Well, unfortunately, you can have severe arteriosclerosis and you can carry on normal activities until something gives way.

One does not necessarily -- In other words, the severity of arteriosclerosis doesn't always produce symptomatology.

Q. There are compensating factors within our systems. A. Right.

Q. When you said, sir, that something gives way, you are referring to the fact that something suddenly occurs? A. Let us say that the mechanism that we call the -- the heart mechanism gives way and fails or gives out.

Q. Doctor, does this happen rather quickly in point of time, as we have in this case with this history of this man working as he did right up to the day before and this particular day, and it was a rather sudden occurrence? A. Yes.

125 Q. Is that right? A. Yes.

Q. Now, expressing if you would, sir, your opinion with reasonable medical certainty, if you are able to, rather than possibilities, but speaking

in terms of probabilities, with reasonable medical certainty based upon the history of any evidence that you have, can you tell the Deputy Commissioner what in fact was the cause of this myocardial insufficiency, why did this man die at the time he died? A. Well, it's a pretty difficult hypothetical question to answer.

All I can say is that based upon the evidence as indicated by the autopsy, this man had enlargement of the heart, he had coronary arteriosclerosis, he had myocardial insufficiency. Either one or all three of these things was sufficient to produce sudden death.

Q. Do you know which one did? A. No, I cannot say which one.

Q. Can you express an opinion with reasonable medical certainty as to whether or not his activities on the job, the urinating, for example, was a precipitating factor that caused death? A. Theoretically, urination could have been a cause of death, as Dr. Chapman pointed out.

126 Q. Can you tell -- A. Not a cause of death. A cause of producing a stress or strain which might have precipitated it.

Q. Doctor, if I can just get to this one point, I can complete with you, sir.

What I'm trying to get from you, sir, is not what could or couldn't have happened, but can you tell us with reasonable medical certainty -- and you are familiar with that term, sir as it is used in court and you have testified here before -- reasonable medical certainty, did the urinating cause this more likely than not? Reasonable certain that the urinating caused this. A. Well, I really can't give you a yes or no answer.

Q. All right. A. Because when you say reasonable certainty, people have had coronaries following bowel movements, following urination.

Q. Doctor, I don't disagree with you. A. So it's possible. It could have happened.

Q. I realize it's possible, sir.

What I'm attempting to demonstrate -- Well, let me rephrase the whole thing and maybe you can answer it with a yes or no.

Would it be --

127 THE DEPUTY COMMISSIONER: If you're asking the probable, I think Dr. Thomas -- Would you say that that was more than any other cause, --

THE WITNESS: No.

THE DEPUTY COMMISSIONER: -- that factor was more of a precipitating cause than anything else that the man did that morning?

Isn't that what you --

THE WITNESS: From the information that was given to me, that could have been a more significant precipitating factor than anything else that I have been told about or that I know about.

BY MR. FEISSNER:

Q. But, sir, our point is this -- We respect you and accept your expertise in the field.

Are you stating to the Commissioner and to this record that in your opinion, based upon reasonable medical certainty, with the information that you have, that urinating was the precipitating factor which caused this death? A. No, I didn't say that.

I said it could have been. I didn't say with reasonable --

Q. It could have been? A. Yes.

128 Q. It also could have been his removing a 90-pound wheel. A. Yes. If --

Q. Couldn't it? A. Yes, if he removed a 90-pound wheel, yes, it could have been.

Q. It could have been that. It could have been many things, couldn't it? A. And also it could have been nothing.

Q. And it also could have been nothing? A. Right.

Q. But it could have been many things, or nothing. A. Yes, that's right.

Q. In other words, Doctor, you cannot give us an opinion with reasonable medical certainty as to what it was, can you? A. I could say -- with

reasonable certainty, reasonable medical certainty, I would say that the coronary arteriosclerosis was the major reason for this man's having the attack.

Q. But can you tell us what was the -- A. The precipitating --

Q. What pushed it over the brink, Doctor? A. What the precipitating event was, I cannot say.

129 MR. FEISSNER: That's all I have.

THE DEPUTY COMMISSIONER: Dr. Thomas, the arteriosclerotic heart disease, that must, of course, have precipitated anything that happened on February 12th, 1964.

Is that correct?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: And medically it is known that it is a progressive type of disease.

Is that correct too?

THE WITNESS: Yes, it is.

THE DEPUTY COMMISSIONER: Now, many hypothetical questions may have been asked you and illustrations about what may have happened.

But I gather from your testimony that whatever was asked of you, you were not able to specifically say that some certain specific thing that was mentioned was the probable precipitating factor.

THE WITNESS: Nothing except the presence of coronary arteriosclerosis.

THE DEPUTY COMMISSIONER: If as a result of this hearing there is sufficient evidence for me to find that at the -- on the morning of this man's collapse and sudden death he was subjected to a great emotional upheaval, would you say that that emotional upheaval was probably the precipitating factor?

130 THE WITNESS: If there was a significant emotional upheaval to stimulate this man excessively, yes, I could say that this could probably be a precipitating factor.

THE DEPUTY COMMISSIONER: On the other hand, if there was no emotional upheaval, of course then, that's out.

Now, the next thing; if it is found that the man engaged in strenuous physical effort some time after he came to work, that is, after he came to work at 8:48 that morning, would you feel that that would probably be a precipitating factor resulting in death?

THE WITNESS: Well, I will answer that with a proviso.

I will say yes, providing there was some symptoms to indicate that the patient was having some distress.

I think the feeling of cardiologists is that the causal relationship between stress, or a physical stress situation, and ensuing death within a short period of time can only be related causally if there is some clinical symptomatology to suggest that the stress was doing something to the heart.

THE DEPUTY COMMISSIONER: In other words, you are telling us that there must first be this beginning of a myocardial insufficiency and then if you have the precipitating factor of strenuous physical effort, you

131 can tie it into the employment.

THE WITNESS: (Nodding head.)

THE DEPUTY COMMISSIONER: Now, it is within the realm of more than possibility, more like a probability, wouldn't you say, that he may have had some symptoms, perhaps several minutes before he collapsed?

THE WITNESS: It's a possibility, yes.

THE DEPUTY COMMISSIONER: We don't have any history of the symptoms because there is nobody, apparently, who was near him prior to the time that he collapsed, and apparently, well, maybe 25-30 minutes before he collapsed he was speaking to his superior in the employment.

We don't know what he's going to testify, but let us assume that he observed some symptoms about the man, some kind of illness. It still would depend upon that strenuous effort in order to say that there was a precipitating factor?

THE WITNESS: It would depend upon the strenuous physical effort followed by symptoms followed by death.

In other words, you couldn't -- You could have -- If you have a physically exerting situation and this is not followed by any symptoms, the causal relationship between the physical exertion and the death is equivocal.

In other words, we can't be as certain about it under those circum-

132 stances as we could be if there was physical exertion, symptoms and death.

THE DEPUTY COMMISSIONER: Wouldn't you consider the collapse as a good symptom?

THE WITNESS: Well, no. I think at that time, from what I gather, I think he died at the time that he fell to the ground.

I'm talking about pain, difficulty in breathing.

THE DEPUTY COMMISSIONER: In other words, are you talking about a little background --

THE WITNESS: That's right.

In other words, in order for me in my mind to causally relate one to the other there has to be the event, the symptoms, and then the death, rather than just the event and the death.

THE DEPUTY COMMISSIONER: Well, let's assume that there are no symptoms up until the man begins to do strenuous physical effort.

Couldn't that strenuous physical effort institute the symptoms --

THE WITNESS: Yes, I would say --

THE DEPUTY COMMISSIONER: -- that caused the myocardial insufficiency?

THE WITNESS: That would be a likelihood, that would be a possibility.

133 THE DEPUTY COMMISSIONER: Earlier in your testimony you said -- you gave an answer to a question, you say from the things you have read.

Did you see the slides that were taken by the Coroner?

THE WITNESS: No, I did not, sir.

THE DEPUTY COMMISSIONER: All right.

Then I believe what you mean when you say what you read is the autopsy report.

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: Any further questions?

MR. FEISSNER: Just this one last thing.

BY MR. FEISSNER:

Q. The only history that you had, as a matter of fact, was the autopsy report.

Have you had anything else that you relied upon? A. No. Just the autopsy report.

Q. Just Exhibit Two of the Commissioner's in evidence.

All right, sir.

THE DEPUTY COMMISSIONER: Mr. McCarthy?

MR. McCARTHY: I've nothing further.

THE DEPUTY COMMISSIONER: Dr. Thomas, thank you very much for your testimony.

You may be excused now.

(Witness excused.)

134

Let's have a ten-minute recess.

(Recess.)

Back on the record.

Mr. McCarthy, your next witness, please.

MR. McCARTHY: I call Mr. Riegel.

Whereupon,

ROBERT C. RIEGEL

was called as a witness by and on behalf of the Respondents and, having first been duly sworn by The Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Give the reporter your full name, please, and your full address.

THE WITNESS: Robert C. Riegel, 401 Belton Road, Silver Spring, Maryland.

THE DEPUTY COMMISSIONER: If you will speak up, we'd appreciate it, so there will be no question about the attorneys hearing what you have to say, and of course, including me too.

All right, Mr. McCarthy, you may proceed.

DIRECT EXAMINATION

BY MR. McCARTHY:

Q. Mr. Riegel, by whom are you employed? A. By Associated Transport.

Q. In what capacity?

135 A. Shop foreman.

Q. Were you so employed in February of 1964? A. Yes, I was.

Q. How long have you been shop foreman, over-all -- A. 19 years.

Q. -- for Associated? A. 19 years.

Q. 19 years? A. Yes.

Q. Was Edward Wheatley an employee who came under your supervision and control as shop foreman? A. Yes.

Q. How long had he been with the company? As far as you know.

A. I imagine a little over 18 years, or somewhere around there.

Q. Now, referring specifically to the date of his death, do you recall what time he got to work that morning? A. I think it was around a quarter of nine, or somewhere in that area.

Q. I see.

Was that his normal starting time, as far as you recall? A. No. His starting time was eight o'clock.

Q. I see.

136 So that he was late that day? A. Yes.

Q. All right.

Now, can you tell us what contacts you had with Mr. Wheatley that morning prior to his death, and the times, as best you recall? A. Well,

I assigned him a job which was cutting off -- two wheel nuts off of an axle tube and which would require using a cutting torch.

And then after that he was to remove the wheel and rethread the axle.

So I had him on that job and I went -- I got on the conference line at 9:30.

Q. What do mean by the conference line? A. Well, that's where all the shop foremen from the area, from -- we report from Newark, New Jersey, to Burlington, North Carolina, to a central maintenance office.

Q. I see.

Now, you say you got on the conference line at about 9:30. A. Yes. We get on the conference line at about 9:30.

Q. And had you given Mr. Wheatley his work assignment prior to getting on the conference line? A. Yes.

Q. How much prior? Can you tell us?

137 A. I would say ten or 15 minutes prior.

By the time the man changed his clothes after he reported in, it would have been about 15 minutes.

Q. Did he change his clothes prior to the time you gave him his assignment? A. Yes.

Q. He would change his clothes subsequent to his hitting the clock, punching in? A. Well, he punched in first, then they would change their clothes.

Q. I see.

Then they get their work assignments? A. That's right.

Q. Then your best recollection is that this was some 10 or 15 minutes before you got on the conference line? A. That's right.

Q. And you got on the conference line at about 9:30? A. Yes. 9:30.

Q. Now, where was he to do this work, physically where was it to be done? A. Right in the shop.

Q. In the shop. A. Yes.

138 Q. Was the vehicle upon which this work was to be done in the shop at the time you assigned him the task? A. Yes, it was, backed in.

Q. Backed into the shop? A. Yes.

Q. I see.

Now then, do you know what he did subsequent to the time you gave him the assignment until the time of his attack? A. No, I don't, because, as I say, if he was working on a truck for maybe 10 or 15 minutes, where he went after that I don't know, until, of course, they came and told me that he had passed out in the yard.

Q. After he had had his attack, did you have an opportunity to look at the truck to which he had been assigned that day? A. Yes. We completed the job later on.

Q. Well, had he done anything that he was supposed to do in terms of, I think you said using a torch in cutting off a couple of nuts, had that been done? A. No, he hadn't even lit the torch. In fact, he hadn't even moved the torch in place to start the job.

Q. I see.

So that I take it that the wheel had not been removed from this truck?

139 A. No. The wheel was still on.

Q. Were all the wheels on -- Strike that.

Was he to work only on one wheel bearing? A. Just one wheel bearing.

Q. I see.

So from your personal observation of the truck subsequent to the time Mr. Wheatley had his attack, nothing had been done to it, no work? A. That's right.

Q. Tell us what you learned about his attack, that is, what part you played. A. Well, I called the emergency operator and, of course, got right through to the ambulance and they sent the ambulance over, and then I went out and looked at Mr. Wheatley, and I got a coat and covered him up.

Q. I see. A. Because it was — I don't know, it wasn't too cold, but it was little damp outside.

Q. Did you check his pulse? A. Yes, and I couldn't find any pulse. But I'm not an expert.

Q. But you felt for it and found none? A. That's right.

Q. How did you learn of this attack? A. Mr. Dickman came and told me, and that's when I called.

140 Q. Was there any other mechanic who was assigned to work with Mr. Wheatley on this particular job? Do you know? A. Well, usually around eight o'clock or eight-thirty to nine, why, you have local trucks you're getting out and you usually assign one or two men to the yard and let one man work on the larger job you have inside.

Q. All right.

Tell me, when you spoke with him at about ten or 15 minutes before you got on the conference line, how did he appear to you? A. He appeared normal.

Q. He did. A. I didn't note anything abnormal.

Q. I didn't hear. A. I say I didn't note anything abnormal.

Q. And he didn't make any complaints that he wasn't feeling well to you at that -- on that morning or anything? A. No, he didn't make any complaints at all.

Q. Did he say to you that the work you were assigning -- that he didn't feel up to doing the work to which you assigned him that morning? Or any comment of that nature? A. No. We were talking about the job and the best way to repair it, because it takes somebody that knows what he's doing.

141 And he is one of the best -- or was one of the best men for that particular type of job.

Q. I see.

So you just discussed how it was going to be accomplished? A. That's right.

Q. But you can testify here to the Deputy Commissioner that he had not begun in any respect to carry out that assignment at the time he had this attack? A. Nothing that was noticeable. He may have gotten his tools over there to get started on the job or something of that nature, which he did, because we put them away later, I know.

Q. Yes.

But the first thing he would have had to do to undertake this assignment would have been to burn off those nuts? A. Yes.

Q. That would have been the first thing. A. That would have been the first thing, in order to get the wheel off.

Q. I see. All right.

MR. McCARTHY: I don't think I have anything further.

THE DEPUTY COMMISSIONER: Mr. Feissner.

142 CROSS EXAMINATION

BY MR. FEISSNER:

Q. Mr. Riegel, in the report of your company it states in regard to an interview had with you by Mr. Webster that you were talking with Mr. Wheatley at around 9:15 regarding his work and that you advised Mr. Webster that after the conversation ended Mr. Wheatley proceeded to the tractor and was working on the tractor the last time Mr. Riegel saw him.

My question is, sir, what was it that you saw Mr. Wheatley do that led you to the conclusion that he was working on the truck? A. Well, number one, you've got to know the man.

Before he started on any job, he was quite meticulous, and he would get all the tools that he probably would need in the next hour or two's work and he would have them right there, because he was crippled in one leg and he didn't do too much running around.

Q. What did you see him do, sir, rather than his history of being a meticulous worker? A. There was nothing noticeable that he had done other than getting ready for the job.

Q. When you said he was working on the tractor the last time you saw him, physically what was he doing?

MR. McCARTHY: Wait a minute. He didn't say he was working. That
143 is in a report by some third party named Mr. Webster, who is the internal security man.

And it says he was working on the tractor. It doesn't say he removed a wheel or anything of that sort.

MR. FEISSNER: I didn't say that.

MR. McCARTHY: I question whether you should cross examine — use this as a statement of this man, when it is not his statement. It is the statement of Mr. Webster.

BY MR. FEISSNER:

Q. What did you tell Mr. Webster? A. I don't recall what I told Mr. Webster at the particular time. He was there and he investigated Mr. Wheatley's —

Q. After Mr. Wheatley left you what did you physically see? Not what you assume, but what did you see? A. Well, there wasn't much time to see anything, because, number one, by the time he got ready to go to work it was probably a quarter after nine, and then you get ready for the long line and you get your other service reports and so forth, and so he wouldn't have too much time to do much work to the unit.

Q. Where were his tools that you had to put away? A. By the wheel, opposite his toolbox.

Q. Was the toolbox open? A. Yes, sir, his toolbox was open.

144 Q. Were some of the tools out? A. Yes.

Q. Am I correct that it was around 9:15 that you spoke with him and it was around 9:30 that you were on the conference phone? A. Yes, we go on the conference line every morning at 9:30.

Q. How long had you been on the wire before you were called out? A. Well, I couldn't have been on it too long because I hadn't given my "out-of-service" yet, and I'm usually third.

Q. Would you say five minutes, ten minutes? A. I would say no longer than ten minutes.

Q. Of your own knowledge, then, Mr. Riegel, you don't know for what period of time this man's toolbox was open? A. I do know that he probably opened it about a quarter after nine.

Q. And set it by the wheel? A. No. He doesn't carry his toolbox around.

In fact he had a big locker where he had some special tools in there and his clothing. And he had another larger toolbox which one man couldn't have lifted.

Q. Then the toolbox, since you found it at the wheel, had to have been carried by Mr. Wheatley? A. I didn't find a toolbox at the wheel.

145 Q. I thought you said you did, sir. A. I said I found some of his tools.

Q. I see.

At the wheel? A. That's correct.

Q. Those tools obviously would have to have been carried by him from the box to — A. That's correct.

Q. -- the wheel. A. Yes.

Q. Was there any toolbox there at all? A. No. There was no toolbox.

Q. You just took the tools up and put them away? A. That's correct.

He had a separate bench where he kept his tools and his locker was next to it, where he kept his toolbox.

Q. Of your own knowledge you, then, do not know whether he had in fact worked on the wheel with any of the tools that he had? A. Well, there was no evidence of any work on the wheel.

Q. With the tools? A. That's correct.

Q. How could you have told whether a lug wrench was put on the wheel lug?

146 A. Well, he wasn't taking the tires off.

Q. Do you know what he was doing? A. Yes. He was removing the wheel, or trying to remove the wheel, and you've got to remove the two — the locknut and the other nut.

But the end of the axle had flared out to where there was no way of removing the nuts unless you burned them off.

Q. Then what was the purpose of the tools? A. Well, you need a hammer and chisel; after you burn through so far, you knock them off.

And maybe a wrench and a pair of pliers or something.

Q. Were a wrench and a pair of pliers and a hammer and chisel by the wheel? A. I'm not certain exactly what tools were there, but there were some of them there.

MR. FEISSNER: That's all.

THE DEPUTY COMMISSIONER: You indicated that Mr. Wheatley came late.

Did you ask him or did he explain the reason for his coming late to work?

THE WITNESS: Well, he was -- he usually was 15, maybe 10 or 15 minutes late. And he did live out in the Beltsville area. And this one morening he was later than he usually was. I had spoken to him a few days prior to that.

147 THE DEPUTY COMMISSIONER: Did he give any reason?

THE WITNESS: Well, I didn't speak to him this particular morning about it.

THE DEPUTY COMMISSIONER: I see.

You say he also would have required a torch in order to do the assignment you gave him.

What type of torch would that be?

THE WITNESS: That would be an acetylene torch.

THE DEPUTY COMMISSIONER: Acetylene torch.

And you didn't find a torch next to the vehicle that he was going to work on?

THE WITNESS: No. He had moved the torch --

THE DEPUTY COMMISSIONER: All you found was some hand tools?

THE WITNESS: That's correct.

THE DEPUTY COMMISSIONER: Apparently you spoke to him, you spoke with him after he changed his clothes -- Incidentally the earlier testimony was that he reported to work at 8:48, which is approximately the time that you stated.

At the time you spoke to him, I believe you have testified, but I just want to make sure, you found nothing unusual, he didn't appear to you like he might be a sick man, he didn't seem to complain --

148 THE WITNESS: I didn't notice anything unusual about the man.

THE DEPUTY COMMISSIONER: In other words, his appearance was the usual appearance that you had encountered in the past?

THE WITNESS: Yes.

He did have a slight cold, I thought, for maybe a week or so.

THE DEPUTY COMMISSIONER: You did examine the vehicle and you found that he had not started any work.

THE WITNESS: That's correct.

THE DEPUTY COMMISSIONER: Did I understand you correctly that the first detail of that job would have been to use the torch?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: That would have been the first detail?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: In order to carry it out, he would first have to cut the axle, is it?

THE WITNESS: No, you cut the --

THE DEPUTY COMMISSIONER: You cut the nuts?

THE WITNESS: You cut the two nuts off.

THE DEPUTY COMMISSIONER: With the torch. And that had not been done?

149 THE WITNESS: No.

THE DEPUTY COMMISSIONER: Mr. Feissner there read from a report that was—apparently has the typewritten name of a Cecil Webster, and he directed your attention to an item there where it says he was working on the tractor.

Can you explain how that particular statement "was working on the tractor" came about?

THE WITNESS: He was assigned to work on a tractor and he was getting his tools and everything else, and his time starts on that vehicle from the time that he — we assign the job.

THE DEPUTY COMMISSIONER: In other words, you say from the fact that he got the tools, went over to the job, you very generally said he was working on the tractor, as sort of a general statement.

THE WITNESS: That's right.

THE DEPUTY COMMISSIONER: That is your explanation of that?

THE WITNESS: Well, when we start a man on a job, any job that takes more than 30 minutes, he's got to account for his time, and what we have is a 501 Mechanic's Time Distribution form.

THE DEPUTY COMMISSIONER: I see.

In other words, your explanation is that it probably was related to his getting paid for working —

150 THE WITNESS: Well, he gets paid from the time he starts, from the time he punches on.

But we account for all our time within our company. We charge out time to each individual vehicle.

THE DEPUTY COMMISSIONER: So it's a management matter.

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: To show the efficiency of the work, that the time is being well spent.

THE WITNESS: Well, so that we can arrive at a cost of one particular vehicle.

In other words, we can tell by an IBM machine what is the cost in on each vehicle we own, and that is for a thousand or more vehicles.

THE DEPUTY COMMISSIONER: So that when he started getting his tools and all of that, you considered that as being — as working on that tractor?

THE WITNESS: That's correct.

THE DEPUTY COMMISSIONER: Would you absolutely deny that he actually did some specific detail of work on that tractor?

THE WITNESS: There was nothing that was noticeable that he did.

THE DEPUTY COMMISSIONER: Nothing at all.

You say the first step would have been the cutting with the torch?

151 THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Any further questions?

MR. FEISSNER: No.

THE DEPUTY COMMISSIONER: Mr. McCarthy?

MR. McCARTHY: I have nothing further.

MR. FEISSNER: One thing I would like to say, Mr. Commissioner, and perhaps you can accept it by way of a proffer, is that Dr. Chapman mentioned in the history that he had some statements made by Mrs. Wheatley as to her husband's going shopping the weekend before with her, getting dressed for church the night before this happened.

If that proffer is not sufficient, I'll put her on to say those two things.

THE DEPUTY COMMISSIONER: I think we can take notice that he probably, if he went to church, I think he probably did.

MR. McCARTHY: Dressed. I'll accept that.

MR. FEISSNER: And he went shopping the night before — the week-end before.

MR. McCARTHY: I'll accept that.

THE DEPUTY COMMISSIONER: The weekend before.

MR. McCARTHY: I have something I want — I just — I was through with Mr. Riegel, but I have one matter I would like to bring up at this point.

152 I would like at this time to move to strike the testimony of Dr. Chapman.

That testimony was based on the hypothesis that the claimant would introduce evidence that Mr. Wheatley was involved in strenuous physical activity prior to the onset of this difficulty.

The words used by Dr. Chapman, "brief violent physical exertion". Those were Dr. Chapman's words.

There is absolutely no evidence in this record now that he was so involved. And since this was a predicate used by Dr. Chapman to express his opinion on causality, I think his testimony should go out as finding no evidential support in this record.

THE DEPUTY COMMISSIONER: You are now presenting an argument, and we don't hold arguments on the formal record, but since you tied it up with a motion to strike all of Dr. Chapman's testimony, I had to let you say what you did.

But we won't hear any arguments on the evidence. That is something I have to argue with myself when I get the transcript and the exhibits from the reporter.

The testimony by the doctors, particularly that testimony which was based on hypothetical questions — I think I have stated it before and of course I think it useless to say it again, but anyway I'll do it, I think we're

153 winding up the hearing.

So I will say that of course the value of the testimony if it is based upon a hypothetical question or set of questions will depend on whether the hypothetical material is factual or not. That's all I can tell you gentlemen.

Mr. Feissner, have you any further testimony?

MR. FEISSNER: No, sir.

THE DEPUTY COMMISSIONER: Is your case in?

MR. FEISSNER: Yes, sir.

THE DEPUTY COMMISSIONER: Mr. McCarthy, any further testimony?

MR. McCARTHY: No. No. No. No further testimony.

THE DEPUTY COMMISSIONER: Your defense is in for your client?

MR. McCARTHY: Yes, sir.

THE DEPUTY COMMISSIONER: All right. I think this hearing can now be closed sine die — Excuse me, Mr. Riegel, I have to excuse you.

The record can show that the witness is excused.

Thank you very much for your testimony.

(Witness excused.)

(Whereupon, the hearing was concluded at 1:31 o'clock p.m.)

[Filed August 10, 1966]

NOTICE OF APPEAL

The Clerk will please enter an appeal in the United States Court of Appeals of the District of Columbia Circuit from the Order of this Court, dated July 28, 1966, wherein the Court granted the defendants' motion for summary judgment, denied the plaintiff's motion for summary judgment and entered judgment accordingly.

/s/ Karl G. Feissner
Attorney for Plaintiff

[Certificate of Service]

BRIEF FOR APPELLEE ADLER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,455

MARY R. WHEATLEY, APPELLANT

v.

HERMAN ADLER, DEPUTY COMMISSIONER

and

ASSOCIATED TRANSPORT, INC., APPELLEES

Appeal from the United States District Court
for the District of Columbia

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U. S. Department of Labor

C. A. No. 354-66

STATEMENT OF QUESTION PRESENTED

In the opinion of appellee deputy commissioner, the question presented is whether the record, considered as a whole, supports the deputy commissioner's finding that the death of the employee was not employment related.

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TABLE OF CASES

Cases—Continued

STATUTES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

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Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE ADLER

COUNTERSTATEMENT OF THE CASE

This cause arose upon an action instituted by appellant, plaintiff below, to review and set aside as not in accordance with law a compensation order filed by Herman Adler, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, on February 2, 1966, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act

of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, and as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600 D.C. Code 36-501.

In that order, the claim of appellant Mary R. Wheatley, as surviving wife of Edward E. Wheatley (hereinafter referred to as "employee"), for workmen's compensation benefits was rejected for the reason that the death of the employee was found not to be related to his employment, i.e., it did not arise out of that employment. The claimant filed a complaint in the Court below which, in effect, took issue with the deputy commissioner's findings. Subsequent thereto, claimant, plaintiff below, filed a motion for summary judgment. The deputy commissioner, as well as the employer and its insurance carrier, filed cross motions for summary judgment. The Court below, upon review of the record, sustained the deputy commissioner's finding, and granted defendants' motions and denied claimant's motion. This appeal followed the dismissal of the action below.

THE COMPENSATION ORDER

The compensation order complained of reads, in pertinent part, as follows:

> Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following
>
> FINDING OF FACT
>
> 1. That on February 12, 1964, Edward E. Wheatley, hereinafter referred to as "employee", was in the employ of the employer above named, whose address is 1936 Montana Avenue, Northeast, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress ap-

proved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was protected by the said employer's qualifying as a self-insurer;

2. That the employment of the employee by the employer was as a mechanic;

3. That at 8:48 a.m. on February 12, 1964 the employee reported for duty with the employer; that approximately at 9:15 a.m. on the said day after he had changed into his work clothes, the employee was instructed by the shop foreman, his immediate superior in the employment, to repair a wheel bearing on a tractor in the shop; that in order to perform this task, the employee was required first to cut off two wheel nuts with an acetylene torch before he could execute any other detail of the assignment; that after taking a hammer, chisel and a pair of pliers from his tool box and placing them alongside of the subject tractor and before securing an acetylene torch the employee walked out of the shop into the back yard for a private purpose; that at 9:30 a.m. or a few minutes thereafter while approximately 40 feet from and on his way back to the shop, the employee collapsed and was pronounced dead at 10:22 a.m. on the same day at the Casualty Hospital;

4. That on November 13, 1964 the employee's widow, Mrs. Mary R. Wheatley, filed claim against the employer for death benefits under the District of Columbia Workmen's Compensation Act, alleging that the death of the employee resulted from his employment;

5. That on said morning, prior to the employee's collapse, neither the employee's wife, the claimant herein, or any one of his co-workers or his supervisor had heard the employee complain of any physical distress or illness, nor did claimant's appearance on that morning suggest to any one of them that he was suffering from an ailment; that on the morn-

ing of his collapse and death the employee, except for gathering some hand tools, as found above, had not started as yet to perform any specific work detail of his assignment; that on the said morning the employee was not subject to any employment-related emotional disturbance or to any significant physical exertion.

6. That the employee suffered from advanced arteriosclerotic heart disease; that such affliction preexisted his collapse on the morning of February 12, 1964; that the collapse and sudden death of the employee was caused by a myocardial insufficiency due to the advanced arteriosclerotic heart disease; that the myocardial insufficiency was neither caused nor aggravated by the employment on February 12, 1964 or prior thereto; that the collapse and death of the employee were not causally related to the circumstances of the employment but was attributable to the myocardial insufficiency which resulted from the natural progression of the arteriosclerotic heart disease; that the collapse and death of the employee did not arise out of and in the course of the employment on February 12, 1964 or prior thereto.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for death benefits be and it hereby is REJECTED for the following reason:

That the collapse and the death of the employee on February 12, 1964 did not arise out of and in the course of the employment.

SUMMARY OF ARGUMENT

The evidence in the record considered as a whole clearly supports the deputy commissioner's finding that claimant had failed to establish that the employee's death was the result of an employment related injury which arose out of the employee's work activities. Accordingly, the Court below correctly concluded by its decision that the finding of the deputy commissioner on the factual issues

presented to him was to be accepted upon judicial review. *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965); *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Phoenix Assurance Company* v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961); *Hurley* v. *Lowe*, 83 U.S. App. D.C. 123, 168 F.2d 553 (1948); *cert. denied* 334 U.S. 828 (1948); *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697 (1941); *General Accident Fire & Life Assurance Corporation* v. *Britton*, 103 U.S. App. D.C. 135, 255 F.2d 544 (1958); *Gooding* v. *Willard*, 209 F.2d 913 (2d Cir. 1954).

ARGUMENT

The deputy commissioner's finding that the employee's death was not employment related is supported by the record considered as a whole and is not irrational.

(a) *Scope of Review*

The standard for judicial review in cases arising under the Longshoremen's Act has been carefully delineated by the Supreme Court. If the findings of the deputy commissioner are supported by substantial evidence, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), or if the deputy commissioner's holding is not irrational, *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965), or if the order under review is not "forbidden by the law", *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), the decision of the deputy commissioner is to be sustained. The fact that the evidence may permit the drawing of diverse inferences will not warrant disturbing the inference or inferences drawn by the deputy commissioner if his selection is reasonable. *Cardillo* v. *Liberty Mutual Insurance Co.*, *supra*; *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935); *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162 (1933).

These principles have found acceptance by this Court in numerous cases under the Longshoremen's Act. *Wolff*

v. *Britton*, 117 U.S. App. D.C. 209, 328 F.2d 181 (1964); *Phoenix Assurance Company* v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961); *General Accident Fire & Life Assurance Corporation* v. *Britton*, 103 U.S. App. D.C. 135, 255 F.2d 544 (1958); *Liberty Mutual Insurance Co.* v. *Britton*, 100 U.S. App. D.C. 236, 243 F.2d 659 (1957); *United States Fidelity & Guaranty Co.* v. *Britton*, 88 U.S. App. D.C. 293, 188 F.2d 674 (1951). The principle has been applied even in instances where, as stated in *Cardillo* v. *Liberty Mutual Ins. Co.*, *supra*, (at p. 478) the inference to be drawn from the facts is "more legal than factual." Thus, even though the reviewing court might not agree with the deputy commissioner's determination for itself (see *Wolff* v. *Britton*, *supra*), that determination, if not "forbidden by the law", is to be sustained. *Cardillo* v. *Liberty Mutual Ins. Co.*, *supra*.

Accordingly, this Court has aptly stated in *Hurley* v. *Lowe*, 83 U.S. App. D.C. 123, 168 F.2d 553, 556 (1948), *cert. denied* 334 U.S. 828 (1948):

> Seemingly, the Deputy Commissioner based his conclusion upon the stipulated fact that the dinner "was of social character" since he coupled his finding of that fact with his ultimate conclusion, in the same sentence. He apparently acted upon the principle that "the course of employment" in the statute does not include incidents "of social character". But we do not think that "social character" necessarily puts an act outside the course of one's employment; luncheons for customers or clients have "social character". The correct criterion is the involvement of the incident in the employment. The meaning of the statutory term, apart from any particular set of facts, is a question of law.
>
> But, while we think that the Deputy Commissioner was in error as to the legal content of the term "in the course of employment" in the statute, we cannot say that his view is "forbidden by the law" or without any reasonable legal basis. This

> state of mind is a common experience, since disagreeing judges upon the same court, while thinking their contrary brethren to be in error, rarely think the other view forbidden by law or without any reasonable basis in law. It follows that under the decision of Cardillo v. Liberty Mutual Co., supra, as we understand it, we must affirm the judgment of the District Court in dismissing the complaint.

Earlier, in the case of *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697 (1941) this Court had said:

> The rule by which we are bound in cases of this character has been stated by us innumerable times. We may not set aside the order of the Deputy except where it appears that there is an error of law or that the finding is not supported by substantial evidence or perhaps where it is clearly arbitrary and unreasonable. It is of no consequence that we might have reached a different conclusion or that there is a sharp conflict in the testimony or even that the evidence preponderates strongly against the view expressed by the Deputy. We cannot substitute our judgment for the Deputy's judgment, nor can we weigh the evidence.

In the instant case, the deputy commissioner's finding is similarly binding and a review of the record discloses that the deputy commissioner's order should accordingly be sustained.

(b) *The Evidence*

The record in the instant case consists of the typewritten transcript of the administrative hearing held before the deputy commissioner on August 31, 1965, with exhibits. With reference to the sole issue that is the subject of review in the present proceeding, namely, whether the employee's death was employment related, witnesses testified in part and in effect as follows:

ROBERT C. RIEGEL: That he was employed by Associated Transport in February of 1964 as shop foreman

(T.* 134-135, J.A. 120-121); that, in this capacity, Edward Wheatley, the employee, came under his supervision and control; that, on the day of the employee's death (February 12, 1964), the employee arrived at work "around a quarter to nine [a.m.]" (T. 135, J.A. 121); that the witness assigned the employee a job cutting two wheel nuts off an axle tube, by means of a cutting torch; that thereafter, the employee was to remove the wheel and rethread the axle; that the witness "got on the conference line at 9:30", the line being one used by shop foremen from various state areas to report to a central maintenance office and used every morning at 9:30; that the witness had given the employee his work assignment 10 or 15 minutes prior to 9:30 a.m. on the day in question; that the employee had changed into his work clothes prior to the time he received his assignment; that employees punched in first, changed into their work clothes, and then got their work assignments; that the work assignment was given to the subject employee some 10 or 15 minutes before the witness got on the conference line at 9:30; that the work of the employee was to be done "*right in the shop*" (T. 136-137, J.A. 121-122); that the vehicle upon which it was to be done was *in the shop* at the time the witness made the assignment to the employee; that the employee thereafter "passed out in the yard"; that the witness examined the truck and noted that *the employee had not even lit or moved the torch into place to start the job* (of cutting off two wheel nuts); that *the wheel which was to have been removed (after the cutting) was still on the truck;* that the work was to have been done on one wheel only; that from what appeared from the truck itself, *none of the assigned work had been done* (T. 138-139, 148, J.A. 123, 129-130); that when the witness learned of the employee's (heart) attack he arranged for an ambulance, went out (in the yard), covered the employee with a coat, and checked his

* T. refers to the typewritten transcript of the proceedings before the deputy commissioner.

pulse; that he "couldn't find any pulse"; that when he had spoken to the employee about 10 or 15 minutes before the witness got on the conference line the employee "appeared normal", nothing abnormal having been observed (T. 139-140, 147-148, J.A. 123-124, 129); that the employee made no complaint about not feeling well, nor did he make any comment about not feeling up to doing the assigned work (T. 140, J.A. 124); that *the employee had done "nothing that was noticeable" to carry out his assignment* on the truck before he had his attack, other than having gotten the (hand) tools, which "we put . . . away later", in preparation of getting started on the job (T. 141, J.A. 125); that, with reference to a statement in the Joint Exhibit No. 1 by a security investigator to the effect that the witness had informed the investigator that, after the employee's 9:15 a.m. conversation with the witness, the employee "proceeded to the tractor and was working on the tractor the last time" the witness saw the employee, the witness merely meant that the employee's work time had started as of the time of the assignment of the job for purposes of affixing cost charges to the particular vehicle; that this cost procedure was a management matter (T. 142-143, 149-150, J.A. 125-126, 130); that the witness considered the employee's getting his tools out (the tools being needed only *after* the torch burning, T. 146, J.A. 128), as working on the tractor (for such cost purpose) (T. 149, 130).

LAWRENCE J. THOMAS, M.D. (an internist with practice in cardiology, T. 116, J.A. 109): That (based upon facts of record as posed in examining counsel's question, and based also upon the employee's autopsy report) it was the witness' opinion that *the death of the employee "was not the result of any activity involved in this man's employment"* (T. 118, J.A. 110); that the reason therefor is that the autopsy report (Deputy Commissioner's Exhibit No. 2, T. 155) shows the employee had generalized arteriosclerosis with significant narrowing of the coronary arteries and *"anything can cause a*

sudden demise under these circumstances"; that the death of such a person can happen in the course of lying in bed, relaxing, or sitting in a chair watching television "without necessarily having any exertion"; that "the absence of any specific stimulating or exertional episode makes me feel that *the* [*fatal*] *attack was in no way related to* [*the employee's*] *employment*" (T. 119, J.A. 111); that in a patient with as much narrowing of the coronary blood vessels as the deceased employee, as documented by the autopsy report, the probability of sudden death is much greater than in a patient without such coronary artery disease, absent evidence of any physical or emotional stress situation; that *there was nothing in the history or the events of the morning in question that would make the witness believe that anything that happened to the employee that particular morning may have been a precipitating factor in his death* (T. 121-122, J.A. 112-113); *that in one who has arteriosclerotic heart disease to such a marked degree as the employee there need be no precipitating factor;* that, mechanically, such cases of arteriosclerosis come very close to closing a coronary artery, or possibly result in a clot or piece of the lining of the artery (plaque) dropping off and (completely) blocking the passage (of blood) into the heart; that it cannot be determined from the autopsy report which of these two causes resulted in the death of the employee, the report merely stating that death was caused by "Myocardial Insufficiency" and "Arteriosclerotic Heart Disease" (T. 122-123, J.A. 113); that "the severity of arteriosclerosis doesn't always produce symptomatology"; that the heart muscle can, in such cases, fail and give out quickly in point of time (T. 124, J.A. 114); that urination could (as claimant's own medical witness, Dr. James E. Chapman, had previously pointed out) "theoretically" produce stress or strain which might precipitate death (T. 125-127, J.A. 114-116);[1] that death of the employee could have been due

[1] Claimant had produced evidence indicating that the deceased employee, when he collapsed, was walking from between two parked

to "*nothing*," meaning to no activity; that the employee's coronary arteriosclerosis (and not any activity) "was the major reason for this man's having the attack" (T. 128, J.A. 116-117); that it was this disease which must have precipitated anything that happened on the day of death (T. 129, J.A. 117); that, with respect to physical stress situations, the belief of cardiologists is that a causal relationship of such stress and subsequent death within a short time "can only be related causally if there is some clinical symptomatology to suggest that the stress was doing something to the heart" (T. 130, J.A. 118); that in the opinion of the witness the claimant "died at the time that he fell to the ground";[2] that, *in a case such as the employee's, symptoms would have to intervene by manifestation before death in order for the witness to causally relate death to stress or physical exertion* (T. 132, J.A. 119).

EDWARD H. PIERCE, a witness called by the claimant, testified from the employee's employment records that the employee's time of arrival at work February 12, 1964, was 8:48 a.m. (T. 48, 51-52, J.A. 66, 68-69).

In an effort to convince the deputy commissioner that the employee's death was causally related to his employment, claimant introduced lay testimony of herself and co-workers of the deceased, and medical testimony of Dr. Chapman, referred to hereinbefore. However, none of the evidence of any witness, lay or medical, of either party indicated that claimant had actually started to engage in his assigned work (other than to change clothes

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vehicles in the yard where he had gone, for personal and non-work connected reasons, to answer a call of nature by voiding.

[2] The case contains conflict as to the precise time of death, which conflict was never satisfactorily resolved. The hospital records and the autopsy report show 10:22 a.m. as the time (see T. 83, J.A. 89; Deputy Commissioner's Exhibit No. 2). But there was contrary evidence including, among others, the testimony just noted and that of Mr. Riegel, indicating that death had occurred earlier. See Joint Exhibit No. 1 at page 1, paragraph 2: "The time of the death was established to be between 9:30 a.m. and 9:40 a.m."

and take hand tools from a tool box) when he collapsed. If urination might be considered a cause of stress responsible for the attack, this was a personal matter having no relation whatever to the assigned work activities. Analysis of the testimony of Dr. Chapman shows his testimony to have but one simple theme: Because death occurred on the employer's premises, death from causes *un*related to employment must, *ipso facto*, be ruled out of consideration, even though the day's assignment had not yet commenced. Obviously, workmen's compensation is not without relation to work. Entitlement is dependent not merely upon time and place alone ("course of employment", as that phrase is used in the compensation law) but, *additionally*, upon an injury "arising out of" (i.e., caused by, such employment, as that quoted phrase is used in the Act). Both elements must be present. In the instant case, the evidence shows the second element was lacking.

(c) *Discussion*

The deputy commissioner's task in the instant case was to decide from the evidence in the record, and the inferences to be drawn therefrom, whether the employee's death from myocardial insufficiency due to arteriosclerotic heart disease was or was not a result of his employment.

It was solely within the province of the deputy commissioner, as trier of the facts, to determine the credibility of witnesses; he could disbelieve any part or all of the evidence presented according to his judgment of its truthfulness and reliability: *Associated General Contractors* v. *Cardillo*, 70 App. D.C. 303, 106 F.2d 237 (1939); *Kwasizur* v. *Cardillo*, 175 F.2d 235 (3d Cir. 1949), *cert. denied* 338 U.S. 880 (1949); *Gooding* v. *Willard*, 209 F.2d 913 (2d Cir. 1954); *Wilson & Co.* v. *Locke*, 50 F.2d 81 (2d Cir. 1931); *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403 (2d Cir. 1961); *Hudnell* v. *O'Hearne*, 99 F. Supp. 954 (D.Md. 1951).

The rule as to acceptance upon judicial review of the deputy commissioner's evaluation of the credibility of witnesses applies also to medical witnesses: *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp.* v. *Hughes*, *supra*, 289 F.2d 403 (2d Cir. 1961); *Gooding* v. *Willard*, *supra*, 209 F.2d 913 (2d Cir. 1954). With respect to any conflict in the medical testimony offered by the parties, a deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence: *Todd Shipyards Corp.* v. *Donovan*, *supra*, 300 F.2d 741 (5th Cir. 1962); *Hampton Roads Stevedoring Corp.* v. *O'Hearne*, 184 F.2d 76 (4th Cir. 1958); *Baltimore & O. R. Co.* v. *Clark*, 56 F.2d 212 (D.Md. 1932); *Jarka Corporation of Philadelphia* v. *Norton*, 56 F.2d 287 (E.D.Pa. 1930); *Liberty Stevedoring Co.* v. *Cardillo*, 18 F. Supp. 729 (E.D.N.Y. 1937); *Zurich General Accident & Liability Ins. Co., Ltd.* v. *Marshall*, 42 F.2d 1010 (W.D.Wash. 1930); *Ryan Stevedoring Co.* v. *Norton*, 50 F. Supp. 221 (E.D.Pa. 1943); *Liberty Mutual Ins. Co.* v. *Marshall*, 57 F. Supp. 177 (W.D.Wash. 1944), *aff'd* 151 F.2d 1007 (9th Cir. 1945); *Contractors PNAB* v. *Pillsbury*, 150 F.2d 310 (9th Cir. 1945); *Crescent Wharf & Warehouse Co.* v. *Cyr*, 200 F.2d 633 (9th Cir. 1952); *Marine Operators* v. *Barnhouse*, 61 F. Supp. 572 (N.D. Ill. 1944); cf. *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

In addition, with respect to the limited scope of review and the binding effect of the resolution of the factual conflicts by the trier of the facts, namely, the deputy commissioner, upon the courts, even in instances where an inference to be drawn from the facts is "more legal than factual", *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), we have heretofore observed the restrictive opinions found in two significant cases from this Court. *Hurley* v. *Lowe*, 83 U.S. App. D.C. 123, 168 F.2d 553 (1948), *cert. denied* 334 U.S. 828 (1948), and *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697 (1941), quoted at length in part "(a)" of this argument, *supra* page 5.

It is readily apparent from the evidence outlined above that the deputy commissioner in the instant case had ample warrant in the record for his determination that there was no causal relationship between the work of the deceased (either as an original, precipitating or aggravating activity or force) and his physical condition and death resulting from myocardial insufficiency. The record contains undisputed evidence to the effect that the employee reported for work on the morning in question at 8:48 a.m., changed into his work clothes, and was given a work assignment about 9:15 or 9:20 a.m. by the shop foreman. The record further shows, without dispute, that the only activity of the employee was that of removing some hand tools preparatory to doing the assigned job. The job itself, however, had never been started.

The record also contains medical-opinion evidence to the effect that the death of the employee was not the result of any activity associated with his employment; and the physician who testified on behalf of the claimant in effect admitted under cross examination that the employee could have suffered his fatal attack even though he might have been "sitting or even sleeping" just prior to the attack. He related death to employment solely by reason of the fact that the employee's fatal heart attack had occurred on the employment premises. The locale of the attack alone was to him sufficient to place responsibility on the employer and carrier, even though there was evidence that no physical employment activity may have resulted in the death which was the terminal aspect of a pre-existing arteriosclerotic condition. Moreover, there was other medical evidence which affirmatively disassociated premises from the cause of death, thereby justifying the deputy commissioner in vitiating any theory of liability predicated merely upon premises alone. Whatever may be the compensation rule where an unexplained death occurs on employment premises, the rule is dissipated when, as here, there exists evidence showing that

the death is of idiopathic origin. See in this connection, by analogy, *Wolff* v. *Britton, supra*, 117 U.S. App. D.C. 209, 328 F.2d 181 (1964). Also see Larson, Workmen's Compensation Law, § 12.11 at p. 192.9, distinguishing between liability for an unexplained cause of death on premises and one which is admittedly personal, i.e., idiopathic.

While workmen's compensation laws will be liberally construed, it should be noted that there still is no presumption of compensability arising from either the mere occurrence of an injury or the mere showing of disability or death, without more. It is essential for claimant to do more than present an application for payment. He must, instead, show to the satisfaction of the trier of the facts that disability or death, or both, are causally related to the employment. The presumption of Section 20(a) of the Longshoremen's Act, 33 U.S.C. 920(a), that a "claim" comes within the Act is not a presumption of compensability arising from the mere filing of an application for benefits. The presumption requires some showing of the existence of facts supportive of the application for compensation. *Hines* v. *Pacific Mills*, 214 S.C. 125, 51 S.E. 2d 383 (1940). A claimant must still establish his claim of compensability. It is still the law that the burden is on him to prove the facts entitling him to an award of compensation, and this burden does not shift. As Judge Learned Hand succinctly put it in the case of *Grain Handling Co.* v. *Sweeney*, 102 F.2d 464, 465 (2d Cir. 1939), *the Longshoremen's Act is not to be extended "so as to make it a general health insurance."*

The extent of the effect to be given the Act's presumption has been carefully delineated by the Supreme Court. Thus, in *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935), where the evidence was even stronger than in the instant case in favor of compensability, the Court sustained the deputy commissioner's denial of death benefits, despite the presumption, in language appropriate to the instant case (pp. 286-287):

> . . . The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this *prima facies*. The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. *Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.* If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, *the issue must be resolved upon the whole body of proof pro and con; and if it permits an inference either way upon the question of suicide, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court.*
>
> For these reasons we are of opinion the Court of Appeals erred in holding that as the evidence on the issue of accident or suicide was, in its judgment, evenly balanced, the presumption must tip the scales in favor of accident. The *only matter for decision was whether the affirmative finding of suicide was supported by evidence.* It is clear that it was so supported and that the court should therefore not have set aside the Deputy Commissioner's order. (Emphasis supplied.)

In the case, here under review, as in the cited case, there was no "lack of competent evidence", lay and medical, supportive of the employer's position that death was

due to causes unrelated to the employee's work. Accordingly, under such circumstances the presumption of the Act "falls out of the case" and permits "an inference either way" by the deputy commissioner upon the question of the relationship of death with the employee's work. As in *Del Vecchio*, there was affirmative evidence of the lack of such relationship. The cases of *Hurley* and *Groom*, *supra*, from this Court clearly recognize the function of the deputy commissioner, rather than the court, to consider and resolve any conflicts in evidence and alternative inferences in just such situations.

Numerous cases showing that there is no presumption of compensability arising from the mere occurrence of injury or death during employment are cited under Key No. 1339, "Workmen's Compensation", American Digest System. A large number of the decisions on this point have gone to the extent of spelling out or specifying in detail the obligation on the part of claimants. See *Central E. & C. Co.* v. *Rossano*, 75 R.I. 108, 64 Atl.2d 197 (1949) (where, in a disability case, it was stated that the mere showing of inability to work is insufficient to support a claim for compensation). Many of these decisions state in various ways that an award of compensation may not be made on the basis of conjecture or speculation and that the claimant must prove all factors or elements essential to a compensable claim: *Robertson* v. *North American Refractories*, 169 Md. 187, 181 Atl. 223 (1935); *Conquy* v. *New Jersey P. & L. Co.*, 23 N.J. Super. 325, 93 Atl.2d 23 (1935); *Houle* v. *Tondreaux Bros. Co.*, 91 Atl.2d 481 (Me. 1953); *Weirton Coal Co.* v. *Mishawake R. & W. Co.*, 119 Ind. 309, 84 N.E.2d 897 (1949); *Broughton* v. *South Carolina G. & F. Dept.*, 219 S.C. 50, 64 S.E. 152 (1951); *Roberts* v. *M. S. Carrol Co.*, 68 So.2d 689 (La. App. 1953); *Wiltze* v. *Borden's Farm Products Co.*, 328 Mich. 257, 43 N.W.2d 842 (1951).

Two Wisconsin cases phrase the standard of proof required of a claimant in terms of dispelling any "legitimate doubt" in the mind of the compensation agency:

Dentrice v. *Ind. Comm.*, 254 Wis. 159, 35 N.W.2d 218 (1949); *Skelly* v. *Ind. Comm.*, 254 Wis. 315, 36 N.W.2d 58 (1949). And in *Lopez* v. *Kennecott Copper Corp.*, 71 Ariz. 212, 225 P.2d 702 (1950), the court said that the claimant must show affirmatively that he is entitled to compensation, that the commission is not required to disprove claimant's contention, and that if reasonable men could reach different conclusions from the evidence the decision of the commission has the same force as the verdict of a jury. For other cases adhering to this principle, see *Rogers* v. *Williams*, 196 Va. 39, 82 S.E.2d 601 (1954); *Anderson* v. *Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954); *Reeves Motor Co.* v. *Reeves*, 204 Md. 576, 105 Atl.2d 236 (1954); *McCaleb* v. *Greer*, 267 S.W.2d 54 (Mo. App. 1954); *Rick* v. *Ind. Comm.*, 266 Wis. 460, 63 N.W.2d 712 (1954).

Disability or death from some disease or consequence of such disease which is unrelated to some industrial mishap (as was here testified to) is not compensable. There is in fact a presumption that such a diseased condition is idiopathic as to both origin and development. See *Macko* v. *Raritan Valley Farms*, 131 N.J.L. 283, 35 Atl.2d 872 (1944), holding that the burden was on claimant to establish that brain injury with symptoms of subarachnoid bleeding shown by yellowish discolored brain tissue was not idiopathic and that the burden to establish an industrial accident is the *sine qua non* for recovery. Also see *Black* v. *Mahoney Troast Const. Co.*, 168 Atl.2d 62 (N.J. Super. 1962).

Whether such a *presumption* of idiopathic cause may or may not be said to exist under the Longshoremen's Act in a case such as the instant one is immaterial to decision here; for as we have heretofore seen there was affirmative evidence that the fatal attack was the result of natural progression of arteriosclerotic heart disease, unaffected by the employment in which the day's work activities had not yet commenced for the deceased. What is important is that the burden to establish industrial

compensability is always on claimants, and this the present claimant has failed to do to the satisfaction of the deputy commissioner.

In addition, it should be remembered that judicial review of a deputy commissioner's rejection of a claim, based as it must be upon *all* the evidence of record introduced by *both* adversaries, involves a somewhat different viewing of the evidence from review of an award of compensation by him. In the latter case there must be affirmative evidence in the record before the deputy commissioner to support the award; in the former, on the other hand, affirmative evidence is not needed since, upon failure of a claimant to carry the burden of proof in support of his claim, the deputy commissioner must reject the claim notwithstanding an absence of affirmative evidence to disprove or negate it. In other words, it is not necessary for the employer to prove a negative. *Gooding* v. *Willard*, 209 F.2d 913 (2d Cir. 1954); *Kwasizur* v. *Cardillo*, 175 F.2d 235 (3d Cir. 1949), *cert. denied* 338 U.S. 880 (1949). The rejection follows the claimant's failure to establish his claim. In the *Gooding* case, the court at page 916 said:

> We might let decision turn on the above, but it should also be noted that *the burden to show that the accident was a contributing cause of the death was on the appellee.* It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, *the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged.* The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show affirmatively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that

> the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision it was error to set it aside. (Emphasis supplied.)

From the foregoing discussion then, it is apparent that not every injury or death which occurs during the course of employment (which refers to time and place) may be said, *ipso facto*, to arise out of the employment (which refers to causation or aggravation resulting in disability or death). To be compensable, both factors must exist.[3] When, as here, affirmative evidence exists that the disability or death was not associated with the employment, the decision of the deputy commissioner is to be sustained. Particularly is this true, under the *Gooding* case's principle, with respect to rejection of claims and the ultimate burden-of-proof requirement imposed on claimants.

Thus, in *Wolff* v. *Britton*, *supra*, 117 U.S. App. D.C. 209, 328 F.2d 181 (1964), where death occurred on the employment premises as the result of the deceased having struck his head on the floor following a non-employment related seizure, the Court, in upholding the deputy commissioner's rejection of death benefits, significantly said (p. 184):

> Whether or not a seizure produces a compensable injury . . . would seem to turn on [the employee] having encountered some occupational hazard, or at least the *injury must have been related to his work* . . . .
>
> * * * *
>
> The Supreme Court has emphasized that the test of the statute, just as we have construed it, does not lie in a causal relation between the *nature* of the employment of the injured person and the accident. Tort principles or common-law concepts of the scope of employment are not controlling. What does mat-

[3] See Section 2(2) of the Longshoremen's Act, 33 U.S.C. 902(2) which defines injury as meaning "accidental injury or death arising out of and in the course of employment".

> ter is "that the 'obligations or conditions' of employment [must] create the 'zone of *special* danger' out of which the injury arose".
>
> Here the deputy commissioner drew the inference from all of the facts as found that the injury suffered by the appellant's decedent did not arise out of his employment. Accordingly he concluded in a record which supports him that the claim was not compensable. Since "there is factual and legal support for that conclusion, our task is at an end" . . . (Emphasis supplied.)

Here, too, there being evidence that the employee's heart attack or seizure was neither caused by nor related to any condition of his employment, it is submitted that this Court's task is likewise at an end.[4] For certainly it cannot be said that the deputy commissioner was, on the record evidence here, "compelled" to accept the claimant's version and award compensation. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504 (1951). Nor can it be said that the deputy commissioner's conclusion was "irrational", *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965), or "forbidden by the law", *Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947).

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[4] In the cited case, one might even better argue for compensability than here since death was due to a fractured skull sustained when the employee actually struck the employer's concrete floor. In the instant case, the physical premises in no way caused or contributed to the employee's death.

CONCLUSION

In view of the above, it is the respectful submission of the appellee deputy commissioner that the compensation order complained of is in accordance with law, and that the judgment of the Court below sustaining it was proper and should be affirmed.

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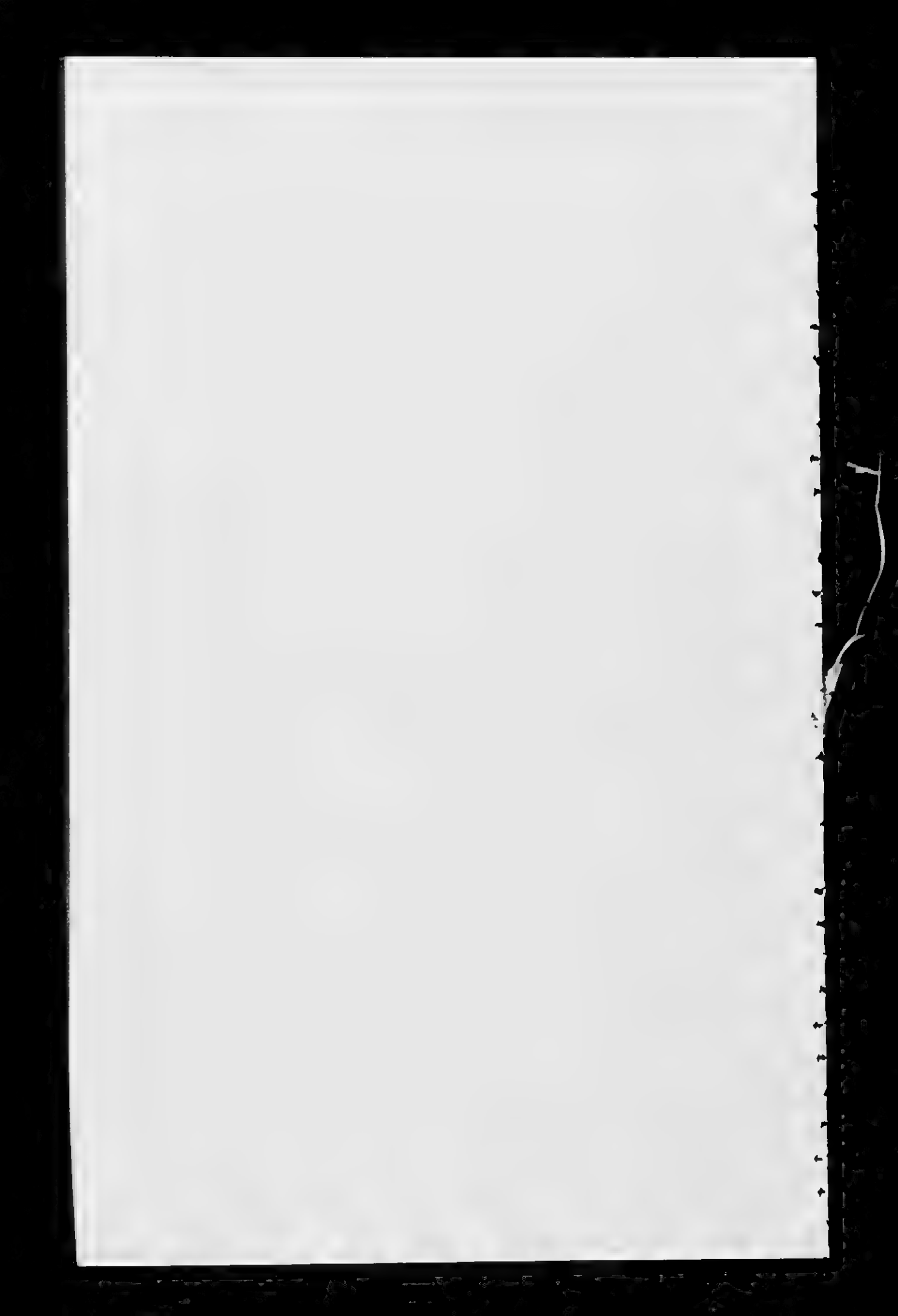

En Banc
1/17/68
(3)

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,455

MARY R. WHEATLEY,

Appellant,

v.

HERMAN ADLER
and
ASSOCIATED TRANSPORT, INC.,

Appellees.

Appeal from the United States District Court
for the District of Columbia

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REPLY BRIEF FOR APPELLANT

SUMMARY OF ARGUMENT

The evidence produced at both the hearing before the Commission, and at the trial below, was sufficient to prove appellant's right to compensation.

ARGUMENT

The appellant wishes to reply to the *ratio decidendi* of the Appellee's brief, and wishes to draw to the attention of the Court several undisputed facts, and several undisputed portions of the applicable law. The Appellee, in its April brief, seems to rely upon the testimony of the insurance company's physician, Dr. Lawrence Thomas. The attention of the Court is respectfully invited to page 117 of the Joint Appendix, wherein the learned doctor states, in response to the question as to "[w]hat pushed it over the brink doctor?" . . . "What the precipitating event was, I cannot say." This is to be viewed in a reasonable light with the testimony of the physician called on behalf of the plaintiff, when the latter stated at the Compensation Hearing that the sudden demise of the decedent was the result of activity performed during the decedent's employment. See Joint Appendix pages 96 and 97. At page 94 of the Joint Appendix, plaintiff's physician stated that "[h]aving established that he couldn't have had an attack beginning more than 45 minutes prior to his death, we have to take the opinion that something happened between 45 minutes before the end of his life, or one hour before the end of his life, and the end of his life which initiated or precipitated a heart seizure." The myocardial insufficiency that decedent had was not, in itself, fatal, but required something more. See Joint Appendix pages 99-101. "Then something must have happened . . ." after the decedent commenced his work activity. Joint Appendix page 101.

Under these facts, it is seen that the plaintiff bore the burden of proof and the defendant's evidence was insufficient, in that the defendant's witness stated that he didn't know what happened, while the plaintiff's witness stated that the cause of the decedent's collapse was work-connected. Under these circumstances, the statutory presumption should prevail and the statement in the Appellee's brief at page 15 that there is no presumption of compensability, which cites cases from South Carolina, is, we

respectfully suggest, erroneous to say the least. The Appellant respectfully suggests to the Court that the correct statement of law is that in the absence of *substantial* evidence to the contrary, a claim comes within the act, and injury or death *is* compensable when it occurs during the normal course of employment, unless there is substantial evidence to overcome this presumption. ***Hancock*** v. *Einbinder*, 114 U. S. App. D. C. 67, 310 F.2d 872 (1962).

It is apparently enough if something unexpectedly goes wrong within the human frame, notwithstanding that the injured person is then engaged in his usual and ordinary work. *Commercial Casualty Insurance Company* v. *Hoage*, 64 App. D. C. 158, 75 F.2d 677 (1935). This statement applies to all workers, for "[a]n employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by some injury which might not affect a normal, healthy person." *Whitehead* v. *Aluminum Company of America*, 361 F.2d 620, 622 (6th Cir., 1966).

In a recent case quite similar to the present facts, the Court stated that

> "[i]n such [unwitnessed] cases causal connection between the work effort and the death must depend upon circumstantial evidence. It is a matter of common knowledge also, that in such cases justice requires a more tolerant appraisal of the evidence supporting the thesis of causation. Although the standard to be met for compensability remains the same, where the 'collapse is unwitnessed and the employee's lips are sealed by death, the courts throughout the country show an understandable readiness' to find the necessary reasonably probable connection on a less formidable *quantum* of testimony."

Aladits v. *Simmons Company*, 47 N. J. 115, 219 A.2d 517, 520, 521 (1966), citing *Gilligan* v. *International Paper Co.*, 24 N. J. 235, 131 A.2d 503 (1957), and *Williams* v. *Corby's Enterprise Laundry*, 64 N. J. Super. 561, 166 A.2d 827 (App. Div. 1960).

In this same vein is the case of *Dwyer* v. *Ford Motor Co.*, 36 N. J. 487, 178 A.2d 161 (1962), wherein the Court stated at page 516 that

> "[w]hen the possibility of causal connection is accepted, we cannot deny relief in all cases simply because science is unable decisively to dissipate the blur between possibility and probability. In such circumstances judges must do the best they can, with the hope their decisions square with the truth, and with a willingness to consider in succeeding cases whatever contribution scientific advances may offer."

For these reasons, Appellant respectfully requests that this Court reverse the decision of the District Court, remand the matter to the Bureau of Employees Compensation without further delay, and direct that an award be made to the widow, and that reasonable costs and counsel fees be allowed.

Respectfully submitted,

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PETITION FOR REHEARING BEFORE THE DIVISION
AND/OR
PETITION FOR REHEARING EN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,455

MARY R. WHEATLEY,

Appellant,

v.

HERMAN ADLER, Deputy Commissioner, United States Department of Labor Bureau of Employees' Compensation, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia

KARL G. FEISSNER
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PETITION FOR REHEARING BEFORE THE DIVISION AND/OR PETITION FOR REHEARING EN BANC

SUMMARY OF ARGUMENT

The Appellant urgently moves the Court to reconsider and rehear the panel opinion of October 2, 1967, because the panel opinion sets forth erroneous concepts of law and fact. Appellant submits that in a

workmen's compensation claim it is the duty of the employer, appellee herein, to produce evidence satisfactory to the Commission. It is respectfully submitted that a factual analysis in this case shows that the employee had something unexpected go wrong within his human frame immediately after bringing tools and an acetylene torch to his place of work within an automotive shop. The employee, a cripple, had moved the acetylene torch and other necessary tools to the location of his work, a difficult and strenuous task for a man of his physical limitations, and had then left this location to go and attend to matters of a private nature. Immediately upon his return to his place of work, the employee suffered a heart attack. The law does not require that the employee submit evidence of stress, strain and trauma or emotional upset, as the Court in its panel opinion has required, but does affirmatively require that the claim come within the Act, unless the *employer* offers evidence which shows that the claim does not fall within the ambit of the Act.

The evidence in this case shows without question that the Decedent, a crippled individual, had commenced his job working on heavy-duty trucks and had, in fact, taken his tools from a tool shed and laid them out in a tractor wheel towards the job of rethreading an axel. The employee had moved the acetylene torch necessary for the work to a convenient location. The statement of the Court in the panel opinion that there was no evidence of any physical or mental strain ignores the nature of a crippled individual of the age of the Decedent and the nature of his work. In addition, the evidence was plain that something unexpected went wrong within the human frame of the Decedent and that this thing that went on, in the eyes of the employer's physician *could* have been caused by the employee's attention to a call of nature; in the testimony of the physician on behalf of the employee, the death was, in terms of *reasonable medical certainty*, in fact, caused by a precipitating event at the job.

The law, as Appellant understands the matter, is that in the absence of substantial evidence to the contrary, it is presumed that the employee's claim comes within the provisions of the Workmen's Compensation Act. The law provides that if the employer cannot carry his burden, then the finding shall be that of the employee. The law further provides that an employer accepts employees subject to their physical infirmities which render them perhaps more susceptible to injury than a healthy person, the employer takes the employee "as is". The cases are legion that accidental injury within the terms of the Act may occur and arise out of the employment, notwithstanding the fact that the employee is engaged in his usual and ordinary work.

It is succinctly held that it is enough if something unexpectedly goes wrong within the human frame. The question has been resolved to whether or not the employment exposes the employee to the risk, or within the orbit of whatever dangers the environment of the employment affords.

ARGUMENT AS TO THE FACTS

According to the foreman of the employer, the Decedent had been assigned the job of removing a tractor wheel and rethreading an axel (J.A. 122), and that the Decedent had changed his clothes and commenced his required assignment. The Decedent had carried his tools to the job location (J.A. 125). The Decedent was a cripple and very meticulous in his work (J.A. 125), and there were tools found at the place where the Decedent had started his job (J.A. 128). The Decedent had moved the "torch" necessary for the job (J.A. 129).

From an examination of the Decedent's autopsy record and the microscopic slides of Decedent's heart tissue, a general practicing physician, emphasizing internal medicine was able to state with *reasonable medical certainty* that the sudden demise of the Decedent

was the result of activity performed during Decedent's employment (J.A. 77, 96, 97).

It was not questioned that the Decedent had to have some precipitating event for his death to come about after he had reached his job (J.A. 94) and that the condition Decedent had, required something more to cause it to go over the brink (J.A. 99, 101). This something extra would include straining, lifting or moving a heavy object or his necessary call to nature (J.A. 86, 92, 94, 103). The physician called on behalf of the employer, while testifying to a legal conclusion that the Decedent's demise was not the result of any activities involved in his employment (J.A. 110) admitted that his only history was obtained through the autopsy report (J.A. 120). He did not see the slides taken by the Coroner (J.A. 119). Noteworthy was the fact that the testimony of the carrier-employer's physician is not in conflict with the testimony of the claimant's physician as the carrier's physician stated as follows:

A. Coronary disease is adversely affected by the cold (J.A. 111).

B. If there is a proven situation where there is an unusual stress or strain, a heart attack could be provoked (J.A. 112). The carrier's physician stated that the fact of urinating on a cold day is sufficient to produce the death (J.A. 111). *It is noteworthy that the doctor feels the act of urinating is not connected with an employment activity*. The Appellant vigorously objects and strongly represents to the Court that whether or not the activity is connected with employment is a question of law and not one for the physician's opinion.

C. The carrier's physician felt that there must be "unusual stress or strain" (J.A. 112). Again Appellant suggests that this is contrary to law as set forth in the case of *Commercial Casualty Insurance Co. v. Hoage*, 64 U.S. App. D.C. 158, 75 F.2d 677 (1935).

D. The carrier's physician stated that he is unable to tell with substantial accuracy what the circumstances causing the death were in this case (J.A. 133).

E. That in this case, as is the general rule with individuals having the condition which the employee had, one carries on normal activities until "something gives way" (J.A. 114). That is to say, the mechanism that we call the heart gives way and gives out suddenly (J.A. 114).

F. The carrier's physician is unable to say what caused the death of the Decedent but admitted that urination could have easily been the cause of death, as Dr. Chapman pointed out (J.A. 115).

G. Indeed the carrier's physician was in such a dilemma that he was unable to give a yes or no (J.A. 115, 116) as to the cause of death, but admitted that a predisposing factor could be a bowel movement or urination (J.A. 126).

H. The carrier's physician closed with the view that what the precipitating event was in this case *"I cannot say"* (J.A. 117).

It is respectfully submitted to the Court that the recitation of these facts, as supported by the record and as elucidated in the dissenting opinion of the panel, shows that in the minds of the physicians there is "medically speaking" a physical strain on an individual with preexisting arteriosclerosis in the act of urinating on a cold day. In addition, common knowledge dictates that the movement of a torch and tools by a crippled, long-time employee and one removal of a wheel of a tractor-trailer is in and of itself a strenuous activity. The majority panel opinion states that all the evidence in the case is negative and Appellant respectfully suggests that such is not the case. It is without question that the carrier's physician is unable to assign anything other than the fact that the employee's physician could well have been right that the act of

urination was the predisposing factor to the death. It follows, therefore, that the only evidence expressed in the degrees of reasonable medical certainty was that of the employee and the carrier was unable to offer any evidence to any degree of reasonable medical certainty as to what, in fact, was the predisposing effect. Under these circumstances the statutory presumption takes over and the claim comes within the provisions of the Act. The claim should have been allowed on its factual basis alone.

ARGUMENT AS TO THE LAW

It is clear in our jurisdiction that the claim of the employee can only be defeated by the employer if it offers substantial evidence showing that the claim is not within the provisions of the Act. *Butler v. District Parking Management Co.*, 124 U.S. App. D.C. 195, 363 F.2d 682 (1966). The majority panel decision in the case at bar flies in the face of the circumstances and presumptions set forth in the applicable statute and set forth in the *Butler* case, op. cit., *Hancock v. Einbinder*, 114 U.S. App. D.C. 67, 310 F.2d 872 (1962), and ignores the proposition in the case of *Commercial Casualty Insurance Co. v. Hoage*, op. cit., that "accidental injury may occur notwithstanding the injured is then engaged in his usual and ordinary work. It is enough if something unexpectedly goes wrong within the human frame." The exposure of the employee in the case at bar on a cold day to the medical stress of urinating is no different in substance than that of the parking lot employee who suffers a heat stroke because he is on the parking lot. This Court, under these circumstances, in *Davison v. Cardillo*, 79 U.S. App. D.C. 121, 143 F.2d 154 (1944) stated:

> "The heat stroke plainly arose out of the employment. Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk."

It is clear in the medical evidence that there was a precipitating event during the time the employee was working. It is uncontradicted that the employee's physician has stated with reasonable medical certainty an accurate opinion supported by diligent examination and microscopic slides, autopsy records, and histories that there is a relationship between the employment and the death of the decedent and that the predisposing event occurred during the employment. It is undisputed that the carrier's physician would not say what, if any, was the predisposing event, but merely stated that the employee's physician may have been right, that the act of urinating was in and of itself sufficient to cause the death. Under these circumstances the statutory presumption should control, notwithstanding the fact that the employee has gone substantially beyond the requirement of the Act and has in fact shown by evidence to a reasonable medical certainty that the death was caused by the employment.

CONCLUSION

The majority panel opinion in the case at bar is erroneous in both fact and law and does not follow the cited decision of this Court, the Supreme Court of the United States or the proper provisions of the applicable statute.

For these and such other reasons as may be heard, the Appellant urgently prays the Court to grant his Petition for Rehearing and rehear this matter.

Respectfully submitted,

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Attorney for Appellant

CERTIFICATE OF COUNSEL

Karl G. Feissner, a member of the bar of this Court, respectfully states to the Court that the foregoing Petition for Rehearing is presented in good faith, after extended legal analysis of the Court's opinion, the record, and adequate legal authorities; that this Petition for Rehearing is not presented for the purpose of delay but is presented because of Counsel's firm belief that the majority aspect of the panel opinion filed herein is erroneous.

Karl G. Feissner

CERTIFICATE OF SERVICE

I hereby certify that on the day of October 1967, a copy of the foregoing petition was mailed, postage prepaid, to George M. Lilly, Esq., U. S. Department of Labor, Washington, D. C. 20210, Attorney for Appellee Herman Adler, and to Joseph F. McCarthy, Esq., 304 Ring Building, Washington, D. C., Attorney for Appellee Associated Transport, Inc.

Karl G. Feissner